147 U.S. 375

RECORD, CASE No. 13,613.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 400. 72

J. H. COOKE AND M. E. COOKE, PLAINTIFFS IN ERROR,

vs.

W. W. AVERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED AUGUST 26, 1889.

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1 DALLAS, TEXAS, *May 20th*, 1889.

Be it remembered that on this the 20th day of May, A. D. 1889, the same being the third Monday of said month, the honorable circuit court of the United States in and for the fifth circuit and northern district of Texas, at Dallas, met in pursuance of law—present, the Honorable A. P. McCormick, United States district judge, presiding; Charles B. Pearre, Esq., United States district attorney; George A. Knight, Esq., United States marshal, and J. H. Finks, Esq., clerk—when and where the following proceedings were had and done, to wit:

SATURDAY, *June 8th*, 1889.

Court met pursuant to adjournment—present, Hon. L. Q. C. Lamar, circuit justice, presiding; Hon. Don A. Pardee, circuit judge; Hon. A. P. McCormick, district judge; Charles B. Pearre, Esq., district attorney; Geo. A. Knight, Esq., marshal, and J. H. Finks, clerk—when and where the following proceedings were had and done, to wit:

(*Plaintiff's Original Petition.*)

STATE OF TEXAS:

In the Circuit Court of United States for Northern District of Texas, at Dallas, Texas, Jan. Term, 1887.

To hon. circuit court:

Your petitioner, W. W. Avery, hereinafter styled plaintiff, complaining of J. H. Cook and M. E. Cook and The Scottish-American Mortgage Company, Limited, hereinafter styled defendants,
2 represents that plaintiff is a citizen of the State of North Carolina and resides in Buncombe county, in said State, and defendants J. H. Cook and M. E. Cook are citizens of the State of Texas and reside in Hunt county, in said State and said northern district of Texas, and defendant The Scottish-American Mortgage Company, Limited, is a citizen of Great Britain and an alien corporation duly organized and incorporated under the laws of Great Britain and is doing business within this State and district, and James B. Simpson is the local agent representing said company and is a citizen of the State of Texas and resides in Dallas county, in said State and district; that on the 25th day of November, A. D. 1886, plaintiff was lawfully seized and entitled to the possession of the tract of land hereinafter described, situated in Hunt county, in said State of Texas and said northern district of Texas, and was entitled to hold the same in fee simple; that afterwards, on the day and year last aforesaid, defendants J. H. Cook and M. E. Cook unlawfully entered upon and dispossessed plaintiff of said premises, and still unlawfully withholds from him the possession thereof, to plaintiff's damage six hundred dollars; that the premises so entered upon and unlawfully withheld by defendants from plaintiff are bounded and described as

follows, to wit: All that certain tract of land situated in Hunt county, Texas, about 15½ miles S. 10 W. from the town of Greenville, being part of the Isaac Linn 342 1/100-acre survey, as shown by patent No. 71, vol. 7, bounded as follows, to wit: Beginning on the N. B. line of original survey and 603 varas west of its N. E. corner, a stake, thence west, with N. B. line of said original survey, 1,608 3/10 varas to a survey out of same original Isaac Linn H. R., now owned by G. H. & W. E. Mensing, of Galveston, Texas; thence south 702 1/10
3 varas to S. B. line of the original survey; thence east 1,608 3/10 varas with S. B. line of original survey; thence north 702 1/10 varas to the place of beginning, containing 200 acres of land, more or less; that the value of said tract of land (exclusive of costs) exceeds the sum of five hundred dollars.

Plaintiff further represents that said *plaintiff*, The Scottish-American Mortgage Company, Limited, claims title and interest in said land adversely to plaintiff, derived from said J. H. Cook and M. E. Cook by a deed of trust executed by said J. H. and M. E. Cook to James B. Simpson as trustee to secure a loan of money made by said company to said J. H. and M. E. Cook; wherefore plaintiff prays that the defendants be cited to answer this petition; that defendants and all persons claiming under them be barred of all right, claim, lien, title, and interest in said premises; that he have judgment for the recovery of the title and possession of said premises and for his damages and costs of suit, and such other and further relief, both general and special, as he may be entitled to in the premises.

R. H. WEST,
COBB & AVERY,
Attorneys for Plaintiff.

This action is brought as well to try title as for damages.

R. H. WEST,
COBB & AVERY,
Attorneys for Plaintiff.

(The foregoing is endorsed as follows, to wit:)
No. 1036. W. W. Avery *vs.* J. H. Cook *et al.* Original petition. Filed Dec. 24, 1886. A. J. Houston, clerk.

4 (*Answer of the Defendant The Scottish-American Mortgage Company, Limited.*)

Cause Pending in the United States Circuit Court for the Northern District of Texas, at Dallas.

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

Comes the defendant The Scottish-American Mortgage Company, Limited, by its attorney, and, demurring to the petition of plaintiff as filed herein, says that the same is insufficient in law for said

plaintiff to have and maintain his aforesaid action; and of this *he* prays judgment of the court.

JAMES B. SIMPSON,
Att'y for said Co.

And, answering said petition, the said defendant, The Scottish-American Mortgage Company, Limited, for its plea in this behalf says that it is true, as alleged in plaintiff's petition, that this defendant claims title and interest in said land adversely to said plaintiff by virtue of a deed of trust executed by J. H. and M. E. Cooke to James B. Simpson as trustee to secure a loan of money made by the said company to the said J. H. and M. E. Cooke; and defendant avers that at the date of the execution of the deed of trust upon said land by the said J. H. Cooke and M. E. Cooke, his wife, to wit, on the 1st day of January, 1886, that the said codefendants, J. H. Cooke and M. E. Cooke, his wife, were at that time in possession of said land and seized of a good and indefeasible title in fee simple thereto and had a good right to sell and convey the same or to execute any mortgages or deeds of trust thereon; wherefore defendant prays that it may be protected in all of its rights under said trust deed and loan as aforesaid made to the said Cooke and wife, and that upon the final hearing hereof it may have such judgment pronounced in its favor as justice and equity may demand; and defendant prays for its special and general relief and redress.

JAMES B. SIMPSON,
Att'y for said Co.

(The foregoing is endorsed as follows, to wit:)

No. 1036. In the United States circuit court. W. W. Avery *vs.* J. H. Cook *et al.* Original answer of the Scottish-American Mortgage Co., Limited. Filed Jan'y 14, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

(*Original Answer of J. H. and M. E. Cook.*)

In U. S. Cir. Court, at Dallas.

W. W. AVERY
vs.
J. H. COOK *et al.*

Now come defendants J. H. and M. E. Cook &, demurring to plaintiff's petition herein, say the same is insufficient in law, & of this pray the judg't of the court.

ROBERTSON & COKE,
Att'ys for J. H. & M. E. Cooke.

And, further answering herein, defendants deny all and singular the allegations in said petition contained, and of this put themselves upon the country.

T. D. MONTROSE &
ROBERTSON & COKE,
Att'ys for J. H. & M. E. Cook.

(The foregoing is endorsed as follows, to wit:)
No. 1036. Cir. court. W. W. Avery *vs.* J. H. Cook *et al.* Orig. ans. of J. H. & M. E. Cooke. Filed Jan'y 13, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

6 (*1st Amended Answer of Def't Cook.*)

In U. S. Cir. Court for Northern District of Texas, at Dallas.

AVERY
vs.
COOK *et al.*

Now comes defendant Cook in the above-entitled cause and, by leave of the court, amending his answer heretofore filed in this cause, says he is not guilty of the wrongs, injuries, & trespasses laid to his charge in plaintiff's petition in manner & form as therein alleged.

ROBERTSON & COKE,
Att'ys for Cooke.

(The foregoing is endorsed as follows, to wit:)
No. 1036. Cook *vs.* Avery. 1st amended answer of def't Cook. Filed Febr'y 17, 1887. A. J. Houston, clerk.

(*Plaintiff's First Amended Original Petition.*)

STATE OF TEXAS:

In Circuit Court of United States for Northern District of Texas, at Dallas, Texas, Jan'y Term, 1888.

To hon. circuit court.

Now comes W. W. Avery, the plaintiff herein, and, upon leave of the court first obtained, files this his first amended original petition in lieu of his original petition, filed herein on Dec. 24, 1886, and says:

Your petitioner, W. W. Avery, hereinafter styled plaintiff, complaining of J. H. Cooke and M. E. Cooke and The Scottish-American Mortgage Company, Limited, hereinafter styled defendants, represents that the plaintiff is a citizen of the State of North Carolina and resides in Buncombe county, in said State, and defend-
7 ants J. H. Cooke and M. E. Cooke are citizens of the State of Texas and reside in Hunt county, in said State and northern district of Texas, and defendant The Scottish-American Mortgage Company, Limited, is a citizen of Great Britain and an alien corporation duly organized and incorporated under the laws of Great Britain and is doing business within this State and district, and James B. Simpson is the local agent representing said company, and he is a citizen of Texas and resides in Dallas county, in said State and district.

That on, to wit, the 25th day *day* of November, A. D. 1889, plaintiff was lawfully seized and entitled to the possession of the tract of

land and improvements thereon hereinafter described, situated in Hunt county, in the State of Texas and within said northern district of Texas, and was entitled to hold the same in fee simple; that afterwards, on the day and year last aforesaid, said defendants unlawfully entered upon and dispossessed plaintiff of said premises, and still unlawfully withholds from him the possession thereof, to plaintiff's damage one thousand dollars; that the premises so entered upon and unlawfully withheld by defendants from plaintiff are bounded and described as follows, to wit: All that certain tract of land situated in Hunt county, Texas, about 15½ miles S. 10 W. from the town of Greenville, being part of the Isaac Linn 342.18-acre survey, as shown by patent No. 71, vol. 7, bounded as follows, to wit: Beginning on the N. B. line of original survey and 603 varas west of its N. E. corner, a stake, thence west, with N. B. line of said original survey, 1,608.3 varas to a survey out of same original Isaac Linn H. R., now owned by G. H. & W. E. Mensing, of Galveston, Texas; thence south 702.1 varas to S. B. line of the original survey; thence east 1,608.3 varas with S. B. line of original
8 survey; thence north 702.1 varas to the place of beginning, containing 200 acres of land, more or less; that the annual rent of said premises is of the value of two thousand dollars per year; that the value of the property in controversy in this suit (exclusive of costs) exceeds the sum of two thousand dollars.

Wherefore plaintiff prays that defendants be cited to answer according to law; that defendants and all persons slaiming under them be barred of all right, title, interest, claim, and lien in said premises; that he have judgment for the recovery of the title and possession of said premises and for his rent, damages, and costs of suit, and such other and further relief, both general and special, as he may be entitled to.

JOHN L. HENRY,
COBB & AVERY,
Attorneys for Plaintiff.

This action is brought as well to try title as for damages.

JOHN L. HENRY,
COBB & AVERY,
Att'ys for Plaintiff.

(The foregoing is endorsed as follows, to wit:)

No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Plaintiff's first amended original petition. Filed Jan'y 13, 1888. A. J. Houston, clerk. John L. Henry, Cobb & Avery, att'ys for plaintiff.

(*Defendants' Motion and Plea to Jurisdiction.*)

In U. S. Circuit Court, at Dallas.

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

J. H. Cooke, being sworn, states that when this suit was brought

and until the trial thereof at a former term of this court this
9 defendant supposed and believed that the plaintiff, W. W. Avery, was a member of the firm of Deere, Mansur & Co., who were plaintiffs in the judgment under which the land in controversy in the above cause was sold when Cobb & Avery bought, and that the purchase by said Cobb & Avery was merely as counsel for the said Deere, Mansur & Co., and that not until this term of this honorable court has this defendant ascertained all the facts enabling him to make affidavit to the plea to the jurisdiction herewith filed.

J. H. COOKE.

Subscribed & sworn to before me this 8th day of February, 1888.

A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas, Texas,
By JAS. D. ADAMS, *Deputy.*

In U. S. Circuit Court, at Dallas.

W. W. AVERY
vs. } No. 1036.
J. H. COOKE *et al.*

Now comes the defendant J. H. Cooke and shows that the plaintiff's claim of title to the land in controversy is through a general warranty deed made to him by Chas. C. Cobb & Jno. M. Avery on November 25, 1886, reciting a consideration of 1,150 dollars; that said Chas. C. Cobb & Jno. M. Avery had purchased or bid in the said land as the property of one Jno. H. Payne at a marshal's sale thereof on Sept. 7, 1886, for the sum of 200 dollars; that the said land at the date of both said conveyances was of the reasonable value of 10,000 dollars, & this value was known to Cobb & J. M. Avery when they conveyed to W. W. Avery; that this defendant was present at said marshal's sale, and the said land was bid in at said sale by Chas. C. Cobb for said Cobb & Jno. M. Avery; that said
Cobb then informed the defendant that he & said Jno. M.
10 Avery would put said title so suit could be brought for said land against this defendant in this honorable court; that W. W. Avery, the plaintiff, is a relative of said Jno. M. Avery, and that this suit was brought by said Chas. C. Cobb & Jno. M. Avery in the name of said W. W. Avery on December 24, 1886; that said conveyance from Chas. C. Cobb & Jno. M. Avery to the said W. W. Avery was without any consideration and was & is feigned only for the purpose of fraudulently conferring jurisdiction on this court; that said Chas. C. Cobb & Jno. M. Avery, at the date of their purchase of said land at marshal's sale aforesaid and at the date of their conveyance to said W. W. Avery and at the date of the institution of this suit and all times intermediate said dates, were citizens of the State of Texas, residing in Dallas county, Texas, & had no right to bring this suit in their own names in this court, and the suit as brought in the name of W. W. Avery is for the sole use & benefit of the said Chas. C. Cobb & Jno. M. Avery & is a fraid upon

the jurisdiction of this court; that the jurisdiction of this court is predicated solely on the citizenship of the parties.

Wherefore this defendant prays the court for leave to withdraw his pleadings heretofore filed in this cause, and that this plea may be then filed, taken, & acted upon as a plea to the jurisdiction of this honorable court, and that on hearing proof of the same this suit may be dismissed, &c., &c.

ROBERTSON & COKE,
Counsel for Cooke.

J. H. Cooke, being sworn, states that the matters averred in the foregoing plea are true as therein stated.

J. H. COOKE.

11 Subscribed & sworn to before me this 8 day of February, 1888.

A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas, Texas,
By JAS. D. ADAMS, *Deputy.*

(The foregoing is endorsed as follows, to wit:)
No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Motion & plea to jurisdiction. Filed Febr'y 8, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy.

(*Order of Court on the Above Motion.*)

MONDAY, *February* 13, 1888.

W. W. AVERY
vs.
J. H. COOKE *et al.* } 1036.

On this day came on to be heard the defendant J. H. Cooke's motion to withdraw his pleadings heretofore filed in this cause, for leave to withdraw his pleadings to the merits, and file plea to the jurisdiction of this court, and, the said motion having been considered, the same was granted.

(*Original Answer of J. H. Cooke.*)

In U. S. Circuit Court, at Dallas.

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

Now comes the defendant J. H. Cooke and, not waiving his plea to the jurisdiction of the court hereinbefore filed, but subject to said plea and only in the event that the same is not sustained, for answer pleads—

That he is not guilty of the matters set forth and charged in plaintiff's petition.

That defendant purchased the land in controversy from J. H. Payne, under whom the plaintiff claims, in actual ignorance
12 of any lien upon said land and in the belief that said tract of land was the homestead of said J. H. Payne, and that no creditor of said Payne could acquire a judgment lien thereon.

That this defendant for more than twelve months before the commencement of this suit had actual adverse possession of said land in controversy, and that during said period defendant made upon said land permanent and valuable improvements in good faith, as follows:

A mill and gin-house, with appurtenances, machinery all complete, of the value — at the cost of	$5,400 00
Repairs upon dwelling-house thereon	600 00
Repairs & buildings at the Fosters tenant premises	750 00
Repairing the Powell tenant premises	200 00
Building one large barn	1,000 00
Repairs on Huffaker's place	150 00
One new large stone house	2,500 00
Building one large tenant-house	1,000 00
Cleaning out & repairing wells	100 00
Clearing & putting in cultivation 40 acres of land	100 00
Repairing & rebuilding fences	200 00
Total	$11,900 00

That said tract of land without said improvements is of the value of 2,000 dollars, and by said improvements the same is enhanced in value by the cost or value aforesaid of said improvements. Defendant prays for value of said improvements if plaintiff recovers said land, &c., &c.

ROBERTSON & COKE,
Counsel for Cooke.

13 (The foregoing is endorsed as follows, to wit:)
No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Original answer of J. H. Cooke. Filed Feb'ry 13, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy.

(*Plaintiff's Second Amended Original Petition.*)

STATE OF TEXAS:

In Circuit Court of United States for Northern District of Texas, at Dallas, Texas, January Term, 1889.

To hon. circuit court:

Now comes W. W. Avery, the plaintiff herein, and, by leave of the court first obtained, files this his second amended original petition in lieu of his original petition, filed herein on December 24, 1886, and in lieu of his first amended petition, filed herein on January 13, 1888, and says:

Your petitioner, W. W. Avery, hereinafter styled plaintiff, com-

plaining of J. H. Cooke and M. E. Cooke and The Scottish-American Mortgage Company, Limited, hereinafter styled defendants, represents that plaintiff is a citizen of the State of North Carolina and resides in Buncombe county, in said State, and defendants J. H. Cooke and M. E. Cooke are citizens of the State of Texas and reside in Hunt county, in said State and northern district of Texas, and defendant The Scottish-American Mortgage Company, Limited, is a citizen of Great Britain and an alien corporation duly organized and incorporated under the laws of Great Britain and is doing business within said State of Texas and said northern district of Texas, and James B. Simpson is the local agent representing said company, and he is a citizen of Texas and resides in Dallas county, in
14 said State and said northern district of Texas.

That on, to wit, the 25th day of November, A. D. 1886, plaintiff was lawfully seized and entitled to the possession of the property and tract of land and improvements thereon hereinafter described, situated in Hunt county, in said State of Texas and within said northern district of Texas, and was entitled to hold the same in fee simple; that afterwards, on the day and year last aforesaid, said defendants entered upon and dispossessed plaintiff of said premises, and still unlawfully withholds from him the possession thereof, to plaintiff's damage three thousand dollars; that the property so entered upon and unlawfully withheld by defendants from plaintiff *are* bounded and described as follows, to wit:

All that certain tract of land situated in Hunt county, Texas, about 15½ miles S. 10 W. from the town of Greenville, being part of the Isaac Linn 342.18-acre survey, as shown by patent No. 71, vol. 7, bounded as follows, to wit: Beginning on the N. B. line of original survey and 603 varas west of its N. E. corner, a stake, thence west, with N. B. line of said original survey, 1,608.3 varas to a survey out of same orginal Isaac Linn H. R., now owned by G. H. & W. E. Mensing, of Galveston, Texas; thence south 702.1 varas to S. B. line of the original survey; thence east 1,608.3 varas with S. B. line of original survey; thence north 702.1 varas to the place of beginning, containing 200 acres of land, more or less; that the annual rent of said premises is of the value of two thousand dollars per year; that the value of the property in controversy in this suit (exclusive of costs) exceeds the sum of two thousand dollars; and said plaintiff further alleges that both plaintiff and said defendants derive title to the above property
15 from one J. H. Payne as a common source of title. Said defendants claim title to said property from said Payne through a certain deed executed by said J. H. Payne & wife, V. A. Payne, on 2nd day of January, 1886. Plaintiff claims title to said property as follows: On the 17th day of January, 1882, in cause No. 198 in this hon. circuit court of the United States for the northern district of Texas, at Dallas (which court had full jurisdiction of said cause and the parties thereto), John Deere, Chas. H. Velie, Alvah Mansur, and L. H. Tibets, partners under the firm name of Deere, Mansur & Company, recovered a judgment against said J. H. Payne for the sum of $717.93 and costs of suit; which judgment has since remained in

full force and effect and unsatisfied except as partly satisfied by the sale under execution of said property, as hereinafter stated. On said date said property was and has ever since remained within said northern district of Texas and within the jurisdiction of this hon. circuit court. On the 6th day of February, 1882, the clerk of this circuit court made out and delivered to said Deere, Mansur and Company an abstract of said judgment; which abstract was made out according to the laws of Texas for fixing and securing the lien of judgments, and said abstract, on Febryary 9th, 1882, was filed in and immediately recorded in the office of the county clerk of said Hunt county, Texas, in the judgment record book of said county, and was on said date also entered upon the index of said judgment record in a proper and legal manner; all of which was done in accordance with the laws of Texas for fixing & securing judgment liens. On March 3rd, 1882, an execution issued from said circuit court on said judgment, which was returned to said court by the marshal of said northern district of Texas "not executed; no property found." On August 11th, 1886, another execution was
16 issued on said judgment by said clerk of said circuit court, and on 7th of September, 1886, by virtue of said execution, said marshal of said northern district of Texas, in accordance with law, sold said property at public auction to Chas. C. Cobb and John M. Avery and executed to them a deed therefor, conveying to them all the estate, right, title, and interest which said J. H. Payne had on the 9th day of February, 1882, or at any time thereafter of, in, and to the above property, and on November 25th, 1886, said Cobb & Avery by their deed conveyed said property to the plaintiff, W. W. Avery; all of which deeds have been duly recorded in said Hunt county. Plaintiff further alleges that by virtue of a law of the United States approved September 24, 1789, and contained in the Revised Statutes of the United States, section 721, and another law of said United States, approved June 1, 1872, and contained in Revised Statutes of United States, section 916, and by virtue of the other laws of the U. S. contained in chapter 18 of said Revised Statutes of U. S., and by virtue of two rules of this hon. circuit court, to wit, rule No. one, adopted at Dallas April 2, 1880, and adopting the modes of proceedings prescribed by the laws of Texas, and rule No. one, adopted at Dallas July 26, 1881, and adopting as the rule of practice of this court the laws and rules of proceedure and practice prescribed by the laws of Texas as they now exist or as they may be changed and amended from time to time, said judgment was a lien upon said property from the date of the rendition thereof up to the sale thereof by said marshal. Plaintiff further alleges that by virtue of the above-mentioned laws of the United States and the above-mentioned rules of this circuit court said judgment became a lien on said property on the date that the abstract thereof was recorded and indexed in said Hunt county, to
17 wit, February 9th, 1882, and continues to be such lien up to the sale of said property by said marshall as aforesaid, and by reason of said lien plaintiff has the superior title to said property. Plaintiff further alleges that his title depends on the validity of

said judgment lien on said property, which he avers was a valid and binding lien on said property at the date of said sale by said marshall, but said defendants herein claim that the laws of the United States and the rules of this court were not complied with in creating and fixing said judgment lien, and they deny that said judgment was ever a valid lien on said property, and this constitutes the main and vital and controlling question in this case, and plaintiff's title entirely depends on the correct decision of said question. Plaintiff further alleges that this suit arises under the laws of the United States and the rules of this hon. court, and this hon. circuit court had at the institution of this suit and has still jurisdiction of said suit, without regard to the citizenship of the parties thereto.

Wherefore plaintiff prays that defendants be cited to answer according to law; that said defendants and all persons claiming under them or either of them be forever barred of all right, title, interest, claim, and lien in and upon said premises; that he have judgment for the recovery of the title and possession of said premises and for his rent, damages, and costs of suit, and for such other and further relief, both general and special, as he may be entitled to.

COBB & AVERY,
Att'ys for Plaintiff.

This action is brought as well to try title as for damages.

COBB & AVERY,
Att'ys for Plaintiff.

18 (The foregoing is endorsed as follows, to wit:)

No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Plaintiff's second amended original petition. Filed February 11, 1889. A. J. Houston, clerk, by W. L. McDonald, deputy. Cobb & Avery, att'ys for plaintiff.

(*Defendants' 1st Supplemental Answer.*)

In U. S. Circuit Court for Northern Dist. of Texas, at Dallas.

AVERY *vs.* COOK. } No. —.

Now come the defendants, Cook and wife, and, replying to the plaintiff's second amended original petition, say that the portion thereof seeking to confer jurisdiction on this court of this cause on the ground that a Federal question is involved is insufficient in law, and thereof judgment is prayed.

And the said defendants further say that if they are not the owners of the land in controversy the title thereto is outstanding in one Y. D. Harrington, to whom it was conveyed by said J. H. Payne before the lien under which plaintiff claims attached, and defendants deny all the averments of said petition.

ROBERTSON & COKE,
Counsel for said Defendants.

(The foregoing is endorsed as follows, to wit:)
No. 1036. W. W. Avery *vs.* J. H. Cook *et al.* 1st supplemental answer. Filed June 8, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

(*Plaintiff's First Supplemental Petition.*)

In U. S. Circuit Court, at Dallas, Texas.

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

19 Now comes the plaintiff, W. W. Avery, and, by leave of the court first obtained, files this his first supplemental petition, and, in answer to the defendants' motion and plea to the jurisdiction filed herein on February 8, 1888, he says:

1st. He excepts to said motion and plea to the jurisdiction, and says that same is insufficient in law, and of this he prays judgment of the court.

2nd. He specially excepts to said motion and plea to the jurisdiction, and says the same is insufficient in law, because it does not negative all the jurisdictional facts alleged in plaintiff's second amended original petition, and specially because it does not negative or deny the facts alleged in said second amended original petition, setting forth that this court has jurisdiction of this suit on the ground that this suit involves the determination of a Federal question arising under the laws of the United States; wherefore he prays judgment, &c.

3rd. He denies all and singular the allegations in said motion and plea to the jurisdiction contained, and of this he puts himself upon the country. Wherefore he prays judgment, &c.; and in reply to defendant J. H. Cooke's original answer filed herein on February 13, 1888, plaintiff says:

1st. He excepts to said original answer, and says the same is insufficient in law, and of this he prays judgment of the court.

2nd. He specially excepts to so much of said original answer as sets up a claim for improvements made upon the land in controversy, because said claim for improvements is equitable, and the allegations made to support said claim involve equitable relief, and the same is cognizable only on the equity side of this court
20 and cannot be set up in answer in this cause; and of this he prays judgment, &c.

3rd. He specially excepts to so much of said original answer as sets up a claim for improvements made upon the land in controversy, and says the same is insufficient in law, because it nowhere appears in said answer that the defendant and those under whom he claims had adverse possession of said land, in good faith and under a claim of title thereto, for at least one year before the commencement of this suit; and of this he prays judgment of the court.

4th. Plaintiff specially excepts to so much of said amended an-

swer as sets up as a basis for defendant's claim for improvements that he bought said land in controversy from J. H. Payne in actual ignorance of the judgment lien through which plaintiff claims title to said land, and in the belief that said land was the homestead of Payne and no creditor could acquire a judgment lien thereon, and said answer does not state that defendant and those under whom he claims title were in adverse possession of said land in good faith under a claim of title for one year after plaintiff acquired title to said land through said judgment lien and for one year prior to the commencement of this suit, because in law a purchase of land subject to a judgment lien and in ignorance of said lien does not give a right to improvements placed thereon before title is acquired by plaintiff through a sale by execution issued on the judgment conferring the lien, and defendant's possession in such case is not adverse to said judgment lien, so as to give him a right to said improvements.

5th. Plaintiff further denies all and singular the allega-
21 tions in said answer, and demands strict proof, &c.

COBB & AVERY,
Att'ys for Plaintiff.

(The foregoing is endorsed as follows, to wit:)

No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Plaintiff's first supplemental petition. Filed June 8, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

(*Defendants' Bills of Exception from* 1 *to* 8.)

In United States Circuit Court for Northern Dist. of Texas, at Dallas, Texas.

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

Bill No. 1.

Be it remembered that in the trial of the above cause the plaintiff introduced in evidence—

(1.) A judgment of this U. S. circuit court rendered on Jan'y 17th, 1882, and entered on the minutes of this court in Minute Book No. 1, page 534; which judgment is as follows, viz:

"JANUARY 17TH, 1882.

JOHN DEERE, CHAS. H. DEERE, S. H. VELIE, ALVAH MANSUR, and L. H. TIBBETS
vs.
J. H. PAYNE. } No. 198.

This day came the plaintiffs, by their attorneys, and said defendant failed to appear and answer in this behalf, but wholly made default; wherefore the said John Deere, Chas. H. Deere, S. H. Velie,

Alvah Mansur, and L. H. Tibbets ought to recover against the said J. H. Payne their damages by occasion of the premises; and, it appearing to the court that the cause of action is liquidated and proven by an instrument of writing, it is ordered that the clerk do assess the damages sustained by said plaintiffs; and the said
22 clerk, now here, having assessed the damages aforesaid at the sum of seven hundred and seventeen dollars and ninety-three cents, it is therefore considered by the court that said plaintiffs do have and recover of the said defendant the sum of seven hundred and seventeen dollars and ninety-three cents; and it further appearing to the court that the note herein sued upon amounts, principal and with interest thereon, as stipulated, at the rate of ten per cent. per annum, to this date to the sum of $682.13, it is therefore ordered by the court that from date of this judgment the said sum of $682.13 shall draw interest at the rate of ten per cent. per annum, and that the balance of this judgment, to wit, the sum of $35.80, shall draw interest at the rate of eight per cent. per annum. It is further ordered by the court that the said plaintiffs do have and recover of the said defendant all their costs in this behalf expended."

In connection with the above judgment plaintiff introduced in evidence the general index of all judgments which have been rendered in this court. This index is kept by the clerk of this court and shows under the proper letter that a judgment in favor of Deer, Mansur & Co. & against J. H. Payne was entered in this court on Jan'y 17th, 1882, in Minute Book No. 1, page 534.

(2.) Plaintiff introduced in evidence an execution issued on said judgment March 3rd, 1882, which was returned by the marshall unsatisfied, no property of defendant found.

(3.) Plaintiff then introduced in evidence an execution issued on said judgment August 11th, 1886, under which the land in controversy was levied on by the U. S. marshall of northern district of Texas on August 12th, 1886, and sold by him on September 7th, 1886, to Chas. C. Cobb and John M. Avery.

23 (4.) Plaintiff then introduced in evidence the said marshall's deed to said Cobb and Avery for said land, made pursuant to said levy and sale, and the deed is dated September 7th, 1886.

(5.) Plaintiff then introduced in evidence the papers in said case No. 198, including the original petition and citation therein. Said original petition in said case described the cause and the plaintiffs therein as follows:

"In Circuit Court of U. S., Northern District of Texas, at Dallas.

DEER, MANSUR & Co.
vs.
J. H. PAYNE. } No. —.

To the honorable judges of said court:

Your petitioners, John Deere, Chas. H. Deere, Stephens H. Velie, Alvah Mansur, and Louis B. Tibbets, citizens of the city of St. Louis, State of Missouri, and who were on April 15th, 1880, and since said

time have been merchants and partners in business, doing business under the firm name of Deer, Mansur & Co., complaining of J. H. Payne," &c.

On the back of this petition was this endorsement, viz:

"In circuit court U. S. No. 198. Deere, Mansur & Co. *vs.* J. H. Payne."

The above endorsement was also on all the other papers in said cause No. 198.

The citation, which was duly served on said Payne, notified him to answer a suit on a promissory note in case "No. 198, of Deere, Mansur & Co., a firm composed of John Deere, Charles H.
24 Deere, Stephen H. Velie, Alvah Mansur, and L. H. Tibbets, plaintiffs, against J. H. Payne, defendant."

Said petition showed that said suit was brought on a promissory note, which was attached to the petition as an exhibit, marked Exhibit "B." Said note was dated April 16th, 1880, and executed by J. H. Payne and payable to the order of Deere, Mansur & Co. (in their firm name only) and bore ten per cent. interest from maturity.

(5.) The plaintiff then offered in evidence a certified copy of an abstract of said judgment in said case No. 198 and a certified copy of the index of said abstract. The certificate thereon of the clerk of the county court of Hunt county, Texas, stated that said certified copy of the abstract was a true copy of the abstract recorded in the Judgment Record Book No. 1, page 47, of Hunt county, now in his office, and that the certified copy of the index — direct and reverse to said page 47 of said Judgment Record Book No. 1, as appeared from said index in his office.

Said certified copy of said abstract was as follows, viz:

"Circuit Court of the United States for the Northern District of Texas, at Dallas.

I, A. J. Houston, clerk of the circuit court of the United States for the northern district of Texas, at Dallas, do hereby certify that in said court, on Tuesday, January 17th, 1882, the plaintiffs recovered a judgment against the defendant for the sum of $717.93, of which the sum of $682.13 shall draw interest from said date at ten per cent. per annum and the balance, $35.80, shall draw interest at eight per cent. per annum, together with the costs by plaintiffs incurred; all of which said judgment and costs is yet due and
25 unpaid by the defendant in case No. 198, and styled Deere, Mansur & Company, plaintiffs, *vs.* J. H. Payne, defendant; all of which appears from the records of said court now in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Dallas, Texas, this 6th day of February, A. D. 1882, and of the Independence of the United States the 106th year.

[Seal of U. S. Circuit Court, at Dallas, Tex.]

A. J. HOUSTON,
Clerk of said Court.

Filed for record Feb'y 9th, 1882, at 10 o'clock a. m.; recorded same day and hour.

A. CAMERON,
Co. Clerk, Hunt Co., Texas."

Said certified copy of said direct and reverse index was as follows, viz:

"*Direct Index to Judgment Record, Hunt County, Texas.*

Plaintiffs' name-: Deere, Mansur & Co.
Defendant's name: J. H. Payne.
Page of judgment record: 47.

Reverse Index to Judgment Record, Hunt County, Texas.

Defendant's name: J. H. Payne.
Plaintiffs' name-: Deere, Mansur & Co.
Page of judgment record: 47."

26 To the introduction in evidence of the above abstract of judgment and index thereof the defendant objected on the ground that said abstract did not correctly give the names of the parties plaintiffs in said judgment, as required by law, and did not show the amount still due on said judgment, and the index did not give the names of the plaintiffs in said judgment, and that by reason of these defects the registration of said abstract and the indexing thereof as done did not give to said judgment a lien upon the land in controversy from the date of the registration of said abstract; which said objections were by the court overruled, and said abstract and index were admitted and introduced in evidence by plaintiff, and the court held that said abstract and index gave said judgment a lien under the Revised Statutes of Texas and did not pass on the question whether such lien existed independent of the statutes of Texas; to which ruling of the court the defendants J. H. Cooke and M. E. Cooke in open court excepted, and this bill of said exception is signed and allowed and ordered to be filed and made a part of the record in this cause.

(6.) The plaintiff then introduced in evidence a deed from Chas. C. Cobb and John M. Avery to the plaintiff, W. W. Avery, for the land in controversy, dated November 25th, 1886.

(7.) Plaintiff then introduced in evidence, for the purpose of proving a common source of title and for no other purpose, a certified copy of a deed from J. H. Payne and wife, V. A. Payne, to defendant J. H. Cooke for the land in controversy. This deed was dated Jan'y 2nd, 1886, and was properly acknowledged by J. H. Payne and wife and recorded in Hunt county, Texas.

(8.) Plaintiff then introduced in evidence the answer of
27 the Scottish-American Mortgage Company, Limited, filed in this case, wherein said defendant Co. claimed title and interest in said land in controversy adversely to plaintiff by virtue of a deed of trust executed by J. H. & M. E. Cooke to Jas. B. Simpson

as trustee to secure a loan of money made by said Co. to said J. H. & M. E. Cooke, said deed of trust being dated Jan'y 2, 1886.

(9.) Plaintiff also introduced in evidence a deed from W. G. Crabtree and Mary Crabtree to J. H. Payne for the land in controversy, dated August 16, 1867, which deed was properly acknowledged by said W. G. & Mary Crabtree and duly recorded in Hunt county, Texas, on April 6, 1868.

(10.) Plaintiff then proved that the annual rental value of the land in controversy was the sum of one thousand and fifty dollars ($1,050.00) per annum, including all improvements.

(11.) Plaintiff then introduced in evidence the original petition and citations in this case of Avery *vs.* Cooke *et al.*, which showed that this suit was commenced on December 24, 1886, as appeared from the file-marks thereon made by the clerk of this court.

(12.) Plaintiff then introduced in evidence two rules of this U. S. circuit court for northern district of Texas, to wit, rule No. 1, adopted by said court at Dallas April 2, 1880, which is as follows, viz: "Rule 1. The modes of proceedings prescribed by the laws of Texas, when they do not conflict with the laws of the United States or a rule of the Supreme Court of the United States or of this court, are adopted."

And also rule No. 1, adopted by said court at Dallas July 26, 1881, which is as follows, viz: "Rule 1. All laws and rules of proceedure and practice prescribed by the Legislature of the
28 State of Texas as they now exist or as they may be changed and amended from time to time, when the same do not conflict with the law of the United States or a rule of the Supreme Court of the United States or of this court, are hereby adopted as the rule of practice in this court, and all suits by attachment, sequestration, or otherwise brought in this court shall conform to the laws of the State of Texas in force at the time such suit is brought, provided the same does not conflict with a law of the United States or a rule of the Supreme Court of the United States or of this court."

(13.) Plaintiff then introduced in evidence the following agreement, signed by the counsel of all parties to this suit, viz: "It is agreed that copies of all title papers now on file or among the court papers in this case, including the deed of assignment made by J. H. Payne to Y. D. Harrington, may be read in evidence without notice or accounting of originals or filing the same, subject, however, to all other legal objections and all objections that might be urged against the originals if they were offered in evidence. It is also agreed that said Y. D. Harrington, assignee, fully administered said trust by said deed of assignment conferred prior to July 1, 1881, and made final report of his proceedings thereunder to the proper court and was discharged by said court prior to said July 1, 1881, and ever since said date has ceased to act as such trustee. It is also agreed that ever since the date of said deed of assignment the said Payne and the said Cooke, claiming under said Payne, have consecutively held peaceable and adverse possession of the land in controversy in thi- suit, cultivating, using, or enjoying the same and

paying taxes thereon and claiming under a deed or deeds
29 duly registered, the deed to Payne antedating said deed of assignment and that to Cooke in evidence. It is also agreed that the assignee, Y. D. Harrington, never made any claim of title to said land by virtue of said deed of assignment or otherwise."

The above and foregoing was all the evidence introduced by plaintiff.

Bill No. 2. And said plaintiff having closed his evidence, counsel for defendants J. H. & M. E. Cooke then suggested to the court that no controversy arising under the laws of the United States had occurred or been presented in said trial, and thereupon by parol motion prayed the court to dismiss said suit for want of jurisdiction. It was admitted in open court that the allegations in plaintiff's pleadings as to citizenship were not true in such wise as to give this court jurisdiction of said suit on the ground of the citizenship of the parties, and that the court was without jurisdiction unless there was in the case a Federal question arising under the laws of the United States and the rules of this court, as averred in plaintiff's pleadings, and counsel for said defendants suggested that said averments were made to confer jurisdiction evasively, and that the trial demonstrated that said averments were not true, and he moved the court orally to dismiss said cause for want of jurisdiction; and thereupon plaintiff offered to prove the following facts, which were admitted in open court to be true by said defendants' counsel, viz: That upon a former trial of this case in this court defendants' counsel contended before the court that by a proper construction of article 916, Revised Statutes of the United States, and the rules of this court adopted in pursuance thereof the laws of Texas
30 as they existed in 1873 in regard to judgment liens governed the lien of the judgment in case No. 198 of Deere, Mansur & Co. *vs.* J. H. Payne, which was sought to be upheld by plaintiff in this case in order to sustain his title, and he contended that by said laws of Texas of 1873 the said lien sought to be upheld in this case by plaintiff was invalid because executions had not issued on said judgment in case No. 198 of Deere, Mansur & Co. *vs.* J. H. Payne each year since its rendition, as was required by said laws of Texas of 1873 in order to keep the lien alive (it being admitted by plaintiff that executions had not issued each year), and that this was defendants' only contention on said former trial in regard to the invalidity of said lien, and that on said former trial plaintiff contended that the lien of said judgment was governed by the laws of Texas contained in the Revised Statutes of Texas passed in 1879, and that this was the proper construction of said article 916 and said rules of this court, and that said lien was valid because by said laws of Texas of 1879 execution was only required to issue within twelve months from the rendition of the judgment, and the lien then stayed alive for ten years without any further issuance of executions, and then the court overruled defendants' said motion to dismiss this suit, and defendants J. H. & M. E. Cooke in open court excepted, and this their bill of said exception is signed and ordered filed and made a part of the record in this suit.

Bill No. 3. And thereupon defendants J. H. & M. E. Cooke, in support of their plea of outstanding title, offered to introduce in evidence a general deed of assignment for the benefit of his creditors from J. H. Payne to Y. D. Harrington, made October
31 16, 1880, under the assignment laws of Texas then in force for the benefit of creditors. This instrument purports to be between three parties—viz., J. H. Payne, of the first part; Y. D. Harrington, of the second part, and the creditors of Payne, of the third part. It is signed by Payne and Harrington, but bu nobody else. It purports to convey to Harrington, in trust for the benefit of such of Payne's creditors only as will accept its provisions, all Payne's property, real and personal, and choses in action, except such as is exempt from forced sale by the laws of Texas. It does not mention the land in controversy specifically either in its body or in the inventory of Payne'- assets or in the exhibits attached to it. It provides that the trustee may dispose of the assigned property at public or private sale, for cash or on credit, and upon such terms as he thinks best, and that he may comp-und and compromise all debts due to Payne upon such terms as he thinks best, and that after paying the expenses of executing the trust and paying the creditors therein provided for in full, then the trustee should pay over any surplus remaining to Payne. By it the party of the first part constitutes the party of the second part his attorney, irrevocable, with powers of substitution, and authorizes the party of the second part to do all acts, matters, and things which party of first — could do if personally present, and the party of the first part binds himself to execute such other instruments as party of second part may deem proper in order to carry into effect this instrument.

To the introduction of this instrument in evidence for the purpose for which it was offered plaintiff objected on the following grounds, viz:

(1.) On the ground that the evidence clearly showed (as
32 shown by bill of exception No. 1) that plaintiff derived his title to the land in controversy from J. H. Payne through the lien of a judgment recovered against Payne which was a lien on said land in controversy and through a levy and sale under an execution issued on said judgment and a deed made by the marshal*l* under said execution, and said defendants claimed also title to said land through said Payne by a deed executed by him on Jan'y 2, 1886, which was after the lien of said judgment had attached to said land, and consequently said defendants could not set up an outstanding title in Harrington in order to defeat plaintiff's recovery in this suit.

(2.) On the ground that the evidence clearly showed (as shown by bill of exception No. 1) that plaintiff and defendants both derive t-eir title to the land in controversy from the same common source of title, to wit, one J. H. Payne (as stated in first objection), and consequently defendants could not set up an outstanding title in Harrington to defeat the recovery of plaintiff in this case.

(3.) On the ground that it clearly appeared from the evidence (as shown by bill of exception No. 1) that J. H. Payne, the common

source of title, had held the land in controversy adversely under a deed, duly registered, from W. G. Crabtree and wife; and defendants, claiming under him by deed, duly registered, had held it adversely; and, under the admitted facts (as shown by agreement of counsel in bill of exception No. 1), if Harrington ever had any title to the land in controversy his title was barred by limitation and was not such an operative, subsisting, and valid title as could defeat plaintiff's recovery in this case.

(4.) On the ground that on the facts admitted by counsel (as shown by agreement of counsel in bill of exception No. 1)
33 said Harrington had closed up said assignment and ceased to act as assignee and been discharged by the court prior to July 1, 1881, and if he had ever had any title to the land in controversy said title was extinguished and the title to the land had reverted to J. H. Payne and those claiming under him.

(5.) On the ground of the variance between the deed from J. H. Payne to Y. D. Harrington pleaded in said defendants' first supplemental answer and the complicated deed of assignment offered in evidence under said pleading.

And all of plaintiff's said objections were by the court sustained, and said deed of assignment was excluded from the evidence, and said defendants, J. H. & M. E. Cooke, in open court excepted, and this their bill of exception is signed and ordered to be filed and made a part of the record herein.

Bill No. 4. And said defendants then offered to introduce in evidence said deed of assignment to prove that the legal title to the land in controversy was not before the court, and that a court of law, therefore, had no jurisdiction of this suit; to which paper for this purpose the plaintiff objected on all the grounds stated in the aforesaid bill of exception No. 3, and on the further ground that said defendants having pleaded specially an outstanding title they could not prove any other defense in this case, and all said objections were sustained by the court and said paper excluded, and said defendants in open court excepted, and this bill of exception is allowed and signed and ordered filed as a part of the record in this case.

Bill No. 5. And said defendants, J. H. & M. E. Cooke, then
34 offered to introduce in evidence to prove their title to the land in controversy the original deed made by J. H. Payne & wife to J. H. Cooke, dated January 2, 1886; to the introduction of which deed for this purpose plaintiff objected on the ground that said defendants, having specially pleaded an outstanding title as a defense, could not prove title in themselves, and this objection was sustained by the court, and said deed was excluded for this purpose, and said defendants in open court excepted, and this bill of said exception is signed and allowed and made a part of the record.

Bill No. 6. And said defendants, J. H. & M. E. Cooke, then offered in evidence said original deed from J. H. Payne to J. H. Cooke, dated Jan'y 2, 1886, under their plea that they had placed permanent and valuable improvements on the land in controversy in good faith and had held adverse possession of same for more than twelve months

before the commencement of this suit; to which deed for this purpose plaintiff objected on the ground that this suit having been commenced on December 24, 1886 (as shown by bill of exception No. 1), and this deed being dated January 2, 1886, said defendants could not have held adverse possession of said land in good faith under a claim of title for more than twelve months before the commencement of this suit, and on the further ground that Cobb and Avery, the plaintiff's vendors, only acquired the legal title to said land on September 7, 1886, by sale under execution, and defendants' possession could not have been adverse before that time; and the court sustained said first objection, not ruling on the other, and excluded said deed from evidence; and said defendants then, in connection with said deed, offered to prove that in October, 1885, more than twelve months before the commencement of this suit, defendant
35 J. H. Cooke and said J. H. Payne had verbally and by parol agreed upon the terms of the trade afterwards carried out between them by said deed, but no consideration was paid said Payne until the date of said deed, and that immediatelt upon said parol agreement the said Payne delivered to said Cooke exclusive possession of said premises, and that said Cooke immediately entered upon such possession, holding adversely and in good faith, and commenced the erection of improvements upon said land as his own, and that he erected upon said land in good faith after the commencement of said possession and before he knew of any judgment lien improvements of the value of ten thousand dollars, and that by that sum enhanced the value of the land in controversy; that said proof offered being in support of their plea of improvements in good faith; to this proof the plaintiff objected on the ground that under the law said parol contract furnished no basis for a claim for improvements, and said defendants could not be adverse possessors in good faith under a *bona fide* claim of title until they obtained said deed, which was on January 2, 1886, when they paid in cash the consideration recited in the deed, and that they obtained said deed less than twelve months before the commencement of this suit, which was on December 24, 1886; which objections were by the court sustained and said evidence excluded, and said defendants, J. H. & M. E. Cooke, excepted in open court, and this bill of said exception is signed, allowed, and ordered filed as a part of the record herein.

Bill No. 7. And the said defendants, J. H. & M. E. Cooke, then offered to prove that from January 1, 1882, until the sale to defendant Cooke the said J. H. Payne was the head of a family
36 consisting of wife and children, and that the land in controversy was claimed and used by him as his homestead, and that the same was at no time subject to judgment lien, execution, levy, or sale, through which plaintiff claimed; to this proof the plaintiff objected on the ground that having pleaded an outstanding title the defendants could not rely upon other defences to said suit, and the said objection was sustained by the court and the said proof was excluded, and in open court said defendants excepted, and this

bill of exception is signed and allowed and ordered filed and made part of the record.

Bill No. 8. And the testimony having thereupon closed by all parties, the entire substance thereof being given in the foregoing bills of exception, the court then instructed the jury to return a verdict for the plaintiff for the land in controversy and for the value of the rents and profits from November 25, 1886, to date of trial, and to this instruction defendants J. H. & M. E. Cooke excepted on the ground of the errors pointed out in former bills of exception, and this bill of said exception is signed, allowed, and ordered filed as a part of the record herein.

And in evidence of the approval by the court of the said 8 bills of exception I have hereunto affixed my official signature in open court this June 15, 1889.

A. P. McCORMICK,
U. S. Dist. Judge.

(The foregoing is endorsed as follows, to wit:)

No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Bills of exception 1 to 8, inclusive. Filed June 15, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

37 (*Judgment of the Court.*)

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

JUNE 8TH, 1889.

On this day came on for trial the above-entitled cause, and all the parties thereto appeared and announced ready for trial, and then came on to be heard the exception of defendants J. H. Cooke and M. E. Cooke contained in their 1st supplemental answer to so much of plaintiff's second amended petition as sets up as a basis for jurisdiction of this court that plaintiff's title is derived through the lien of a judgment of this court and therefore presents a Federal question; and then also came on to be heard the general and special exceptions of plaintiffs contained in his 1st supplemental petition to said defendants' plea to the jurisdiction of this court; all of which said exceptions were considered by the court together, and after hearing the argument of counsel the court is of opinion that the law is for the plaintiff upon all of said exceptions. It is therefore considered and adjudged by the court that said exceptions of said defendants be, and the same *is* hereby, overruled and not sustained, and that said exceptions of said plaintiff be, and the same are hereby, sustained; to which rulings of the court said defendants then and there in open court excepted; and then came on to be heard the general and special exceptions of plaintiffs contained in his said 1st supplemental petition to so much of the original answer of said defendants, J. H. Cooke and M. E. Cooke, as sets

up a claim for valuable and permanent improvements placed
38 on the land in controversy in good faith by said defendants,
and the court is of the opinion that the law on said exceptions of plaintiff is for said defendants. It is therefore considered and adjudged by the court that said exceptions of plaintiff be, and the same are hereby, overruled and not sustained; and then came a jury of good and lawful men, to wit, Henry Diceman, L. S. Garrison, W. R. Spencer, Rob't Fitzgerald, F. M. Maddox, Sam'l Carter, B. H. Star, Wm. Paxton, Wm. Thomas, A. L. Phillipps, H. F. Trawick, and P. G. Maffia, who were duly and legally elected, empanneled, and sworn, and who, after hearing the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on, to wit, June 10th, 1889, returned into open court the following verdict, to wit: "We, the jury, find for the plaintiff title to the land in controversy and damages in the sum of two thousand six hundred thirty-eight and 12½-100 dollars ($2,638.12½).—L. S. Garrison, foreman." It is therefore considered and adjudged by the court that the plaintiff, W. W. Avery, do have and recover of the defendant-, J. H. Cooke and M. E. Cooke and The Scottish-American Mortgage Company, Limited, the title and possession of the land and premises hereinafter described, together with the fixtures and permanent improvements thereon and appurtenant thereto, said land and premises being described and bounded as follows, to wit: All that certain tract of land situated in Hunt county, Texas, about 15½ miles S. 10 W. from the town of Greenville, being part of the Isaac Linn 342.18-acre survey, as shown by patent No. 71, vol. 7, bounded as follows, to wit: Beginning on the N. B. line of original survey and 603 varas west of its N. E. corner, a stake, thence west, with N. B. line of said original survey, 1,608.3 varas to a survey out of said original
39 Isaac Linn H. R., now owned by G. H. and W. E. Mensing, of Galveston, Texas; thence south 702.1 varas to S. B. line of the original survey; thence east 1,608.3 varas with S. B. line of original survey; thence north 702.1 varas to the place of beginning, containing 200 acres of land, more or less. It is further considered and adjudged by the court that said plaintiff have his writ of possession to issue for said property. It is further considered and adjudged by the court that said plaintiff, W. W. Avery, do have and recover of said defendants, J. H. Cooke and M. E. Cooke, the sum of two thousand six hundred and thirty-eight and 12½-100 dollars ($2,638.12½), with interest thereon from this date at the rate of eight (8) per cent. per annum, together with his costs in this behalf expended, for which execution may issue. It is further ordered that the officers of court have execution against each party hereto respectively for the costs by them herein incurred.

(*Motion for Severance.*)

In U. S. Circuit Court, at Dallas.

W. W. AVERY
vs.
J. H. COOKE *et al.* } No. 1036.

Now come J. H. Cooke & M. E. Cooke, defendants in the above-entitled cause, and respectfully show to the court that they desire to have the judgment in said cause reversed in the supreme court; that their codefendant, The Scottish-American Mortgage Company, Limited, declines to join in the prosecution of said writ of error. Wherefore said defendants pray for notice to be served upon said codefendant and for a severance and authority for these defendants to prosecute a writ of error in said cause independent of their said codefendant, &c., &c.

ROBERTSON & COKE,
Counsel for J. H. & M. E. Cooke.

40 (The foregoing is endorsed as follows, to wit:)
No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Motion for severance. Notice of this motion is waived, & the facts stated in it are hereby admitted to be true. June 12, 1889. James B. Simpson, counsel for Scottish-American Mortgage Company, Limited. Filed June 1*e*, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

(*Order of Court on Above Motion.*)

W. W. AVERY
vs.
J. H. COOKE *et al.* } 1036.

JUNE 14, 1889.

On this day came on to be heard the motion of the defendants, J. H. & M. E. Cooke for a severance in the prosecution of a writ of error herein from their codefendant, The Scottish-American Mortgage Company, Limited; and it appearing to the court that said codefendant has been duly cited and refused to join in the prosecution of said writ of error, it is considered and so ordered that said motion be granted and the said J. H. and M. E. Cooke be, and they are hereby, authorized to prosecute said writ of error independent of their codefendant aforesaid.

(*Petition for Writ of Error.*)

To the hon. justices of the Supreme Court of the United States:

Now come J. H. Cooke & M. E. Cooke, by their counsel, and complain that in the record & proceedings & also in the judgment in a suit between W. W. Avery, plaintiff, and J. H. Cooke,
41 M. E. Cooke, and The Scottish-American Mortgage Company, Limited, defendants, tried in the circuit court of the United

States for the northern district of Texas, at Dallas, at the May term, 1889, and in which judgment was rendered against said defendants on, to wit, June 8, 1889, manifest error hath intervened, to the great damage of said defendants, J. H. Cooke and M. E. Cooke. Petitioners, said J. H. & M. E. Cooke, pray for the allowance of writ of error & such other process as may cause the said judgment & proceedings to be corrected by the Supreme Court of the United States.

ROBERTSON & COKE,
Counsel for J. H. & M. E. Cooke.

Being satisfied by the proof that the land in controversy exceeds in value the sum of five thousand dollars, the writ of error prayed for by J. H. & M. E. Cooke is allowed, & the bond for supersedeas is fixed at the sum of seven thousand dollars.

This June 17, 1889.

A. P. McCORMICK,
U. S. Dist. Judge.

(The foregoing is endorsed as follows, to wit:)

No. 1036. W. W. Avery *vs.* J. H. Cooke *et al.* Petition for writ of error. Filed June 17, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

(*Writ of Error Bond.*)

In the Supreme Court of the United States.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,
versus
W. W. AVERY, Defendant in Error.

Know all men by these presents that we, J. H. Cooke and
42 M. E. Cooke, as principals, and Wm. Hodges, O. F. Hail, and J. M. Johnston, as sureties, are held and firmly bound unto W. W. Avery in the sum of seven thousand (7,000) dollars, to be paid to him, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this the 15 day of June, 1889.

Whereas the said J. H. Cooke and M. E. Cooke have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of W. W. Avery *vs.* J. H. Cooke, M. E. Cooke, and The Scottish-American Mortgage Company, Limited, on the 8th day of June, 1889, in which it was adjudged that said W. W. Avery recover of said J. H. Cooke and M. E. Cooke and Scottish-American Mortgage Company, Limited, that certain tract of land situate in Hunt county, Texas, about 15½ miles S. 10 W. from the town of Greenville, being part of the Isaac Linn 342$\frac{18}{100}$ acre survey, as shown ny patent No. 71, vol. 7, bounded thus: Beginning on N. boundary line of the original survey 603 varas W. of its N. E. corner, a stake, thence W., with N. B. line of said origi-

nal survey, 1,608 3/10 varas to a survey out of said original Isaac Linn H. R., now owned by G. H. & W. E. Mensing, of Galveston, Texas; thence S. 702 1/10 varas to S. boundary line of the original survey; thence E. 1,608 3/10 varas with S. B. line of original survey; thence 702 1/10 varas to the place of beginning, containing 200 cares of land, more or less, together with the fixtures and permanent improvements thereon, for which said W. W. Avery was awarded a writ of possession; and in which said judgment it was further adjudged that said W. W. Avery recover of said J. H. Cooke
43 and M. E. Cooke the sum of two thousand six hundred and thirty-eight and 12½-100 dollars, with interest from date of judgment at the rate of eight per cent. per annum, for which execution was authorized to issue; and the said Scottish-American Mortgage Company, Limited, having declined to join in the prosecution of said writ of error, and upon notice the said J. H. Cooke and M. E. Cooke having been severed for the purpose of said writ of error from said Scottish-American Mortgage Company, Limited:

Now, therefore, the consideration of this obligation is such that if the said J. H. Cooke and M. E. Cooke shall prosecute their writ of error to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

J. H. COOKE. [SEAL.]
M. E. COOKE. [SEAL.]
WM. HODGES. [SEAL.]
O. F. HAIL. [SEAL.]
J. M. JOHNSTON. [SEAL.]

STATE OF TEXAS, }
Hunt County. }

I, J. G. Shepherd, clerk of the district court of Hunt county, do hereby certify that the sureties whose names appear above to the foregoing bond would be accepted by me officially as amply sufficient to make good any bond for the sum of seven thousand dollars.

Witness my hand & official seal this June 17, 1889.

[Seal Dist. C't, Hunt Co., Tex.]

J. G. SHEPHERD,
Cl'k Dist. C't, Hunt Co., Texas.

Examined & approved as a supersedeas bond this June 17, 1889.

A. P. McCORMICK,
U. S. Dist. Judge.

44 (The foregoing bond is endorsed as follows, to wit:)

No. 1036. J. H. & M. E. Cooke, plaintiffs in error, *vs.* W. W. Avery, defendant. Writ of error bond. Filed June 17, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between W. W. Avery, plaintiff, and J. H. Cooke and M. E. Cooke and the Scottish-American Mortgage Company, Limited, defendants, a manifest error hath happened, to the great damage of said J. H. Cooke and M. E. Cooke, as by their complaint after order of severance from their codefendant is made to appear, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if the judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court, the 17 day of June, A. D. 1889, and the seal of said circuit court, at Dallas, in the 113th year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Dallas, Northern Dist. Texas.]

J. H. FINKS,
Clerk of the United States Circuit Court,
Northern Dist. Texas, at Dallas,
By CHAS. H. LEDNUM, *Deputy.*

45½ [Endorsed:] No. 1036. (18.) J. H. & M. E. Cooke, plaintiffs in error, *vs.* W. W. Avery, defendant in error. Original writ of error. Filed June 17, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

46 UNITED STATES OF AMERICA, *ss:*

To W. W. Avery, Greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth judicial circuit and northern district of Texas, at Dallas, wherein J. H. Cooke & M. E. Cooke are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. P. McCormick, United States district judge for the northern district of Texas, holding circuit court at Dallas, within said district, this the 17 day of June, A. D. 1889.

A. P. McCORMICK,
U. S. Dist. Judge.

46½ [Endorsed:] No. 1036. J. H. & M. E. Cooke *vs.* W. W. Avery. Citation in error. We hereby acknowledge that we have this day been served with a true copy of the within citation in error this June 17, 1889. Cobb & Avery, counsel for W. W. Avery, defendant in error. Filed June 17, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

47 (*Assignment of Errors — Pl'ff- in Error.*)

J. H. & M. E. COOKE, Plaintiffs in Error,
versus
W. W. AVERY, Defendant in Error.

In the Supreme Court of the United States.

Assignments of error by plaintiffs in error.

I.

The court below erred in overruling the demurrer of defendants (plaintiffs in error) to that part of plaintiff's petition intended to set up in said cause a controversy arising under the laws of the United States, and thus to confer jurisdiction independent of the citizenship of the parties, and in sustaining the exceptions of plaintiff (defendant in error) to the plea of defendants that such title as the plaintiff appeared to have was apparent and colorable only, and so put in him by citizens of Texas fraudulently to impose upon said court jurisdiction of a cause not properly cognizable therein.

II.

The court below erred in admitting in evidence the certified copy from the registry of Hunt county of the abstract of judgment and index to the record thereof, under which plaintiff below claimed over defendants' objections thereto, and in holding that said abstract and index conferred upon said judgment a lien upon the land in controversy, as shown by bill of exception No. 1.

III.

The court below erred in refusing to dismiss this suit for want of jurisdiction upon defendants' suggestion and motion after the plaintiff had closed his testimony, and no controversy arising under
48 the laws of the United States had been presented, and the plaintiff had in open court admitted that jurisdiction could not be sustained on the ground of the citizenship of the parties, as shown by bill of exception No. 2.

IV.

The court below erred in excluding as evidence of outstanding title the deed from J. H. Payne to Y. D. Harrington, as shown by bill of exception No. 3.

V.

The court below erred in excluding said deed when offered by defendants to show that the legal title to the land in controversy was not before the court, as shown by bill of exception No. 4.

VI.

The court below erred in excluding the deed from J. H. Payne and wife to defendant J. H. Cooke when offered as evidence of defendants' title to the land in controversy, as shown by bill of exception No. 5.

VII.

The court below erred in excluding said deed and the other evidence offered with it in support of defendants' plea of improvements made by them upon the land in good faith, as shown by bill of exception No. 6.

VIII.

The court below erred in excluding proof offered by defendants that the land in controversy, during the time when plaintiff claimed there was a judgment lien upon it, was the homestead of J. H. Payne and wife and not subject to such lien or to execution sale, as shown by bill of exception No. 7.

49 IX.

The court below erred in instructing the jury to return a verdict for plaintiff, as shown by bill of exception No. 8.

X.

The court below erred in directing any verdict or rendering a judgment against defendant M. E. Cooke for damages, the proof showing no liability upon her part.

XI.

The court below erred in rendering judgment for damages against J. H. & M. E. Cooke only, when the plea, proof, and verdict were equally against all the defendants.

For said errors and others apparent in the record the plaintiffs in error pray that the judgment below may be reversed and for such other orders and judgment as the law and the record may require.

SAWNIE ROBERTSON,
Counsel for J. H. and M. E. Cooke, Plaintiffs in Error.

(The foregoing is endorsed as follows, to wit:)

J. H. & M. E. Cooke, plaintiffs in error, *vs.* W. W. Avery, defendant in error. Assignments of errors. Filed July 15th, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

50 (*Clerk's Certificate.*)

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing forty-nine pages contain a full, true, and correct transcript of the record in cause number 1036, of W. W. Avery, plaintiff, *versus* J. H. Cooke *et al.*, lately pending at Dallas, Texas, in said court, except that the original writ of and citation in error are included in the transcript instead of copies thereof.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof, this the 15th day of July, A. D. 1889.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of said Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: Case No. 13,613. N. Texas C. C. U. S. No. 400. J. H. Cooke and M. E. Cooke, plaintiffs in error, *vs.* W. W. Avery. Filed August 26, 1889.

Office Supreme Court
FILED
NOV 14 1892
JAMES H. McKENNEY
Clerk

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

Brief and Argument for Plaintiffs in Error.

M. L. CRAWFORD,
Counsel for J. H. and M. E. Cooke, Plaintiffs in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

Original

141 U 835

I hereby waive the filing of the briefs of Plaintiffs in error in this case six days before the calling of the case and waive all objections to the Court considering said briefs, because not filed six days before the case is called. Nov. 7th 1892.

Office Supreme Court U. S.
FILED
NOV 14 1892
JAMES H. McKENNEY,
CLERK.

John M. Avery
Counsel for W. W. Avery
Defendant in error.

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

Brief and Argument for Plaintiffs in Error.

M. L. CRAWFORD,
Counsel for J. H. and M. E. Cooke, Plaintiffs in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

Original

141 U 835

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In the Supreme Court of the United States,

OCTOBER TERM, 1892.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

Brief and Argument for Plaintiffs in Error.

STATEMENT OF THE NATURE OF THE CASE.

This action is one of trespass to try title to a tract of land in Hunt county, Texas, described in plaintiffs' petition, which action under the laws of Texas is the action whereby the title to real estate is tried. Prior to the institution of aforesaid action, J. H. Cooke and wife, M. E. Cooke, plaintiffs in error and defendants below, were in possession of the land in controversy, claiming to own the same, and had executed a deed of trust upon said land whereby they conveyed it to one J. B. Simpson as trustee, to secure the Scottish American Mortgage Company, limited, in the payment of a certain indebtedness due from said Cooke and wife to said company. W. W. Avery, defendant in error and plaintiff below, claiming title to said land adversely to the said Cooke

and wife and the said Mortgage Company, on December 24th, 1886, filed in the above named circuit court his petition in trespass to try title to said land, making said J. H. and M. E. Cooke and the said Mortgage Company defendants, which petition was in the usual form in such actions. In this petition plaintiff alleged that he was a citizen of the State of North Carolina; that said J. H. and M. E. Cooke were citizens of the State of Texas, and that said defendant Mortgage Company was an alien corporation and a citizen of Great Britain. (Printed Record, pp. 1 and 2.)

On January 13th, 1887, the said J. H. and M. E. Cooke answered to the merits. This answer having no bearing upon the questions now involved, it is unnecessary further to refer to it. (Printed Record, p. 3.)

On January 14th, 1887, the defendant Mortgage Company answered by a general demurrer and by a plea that when said Company took said trust deed, said Cooke and wife were in possession of said land seized of good title in fee simple thereto, and had the right to convey the same by said instrument. (Printed Record, pp. 2 and 3).

On February 17th, 1887, said Cooke amended his answer filed January 13th, 1887, but made no change therein material to be here mentioned.

On January 13th, 1888, the plaintiff amended his petition filed December 24th, 1886, but made no change therein material to the questions now involved. (Printed Record, pp. 4 and 5).

On February 8th, 1888, while the pleadings stood as above shown, defendant Cooke presented to the court

a plea to the jurisdiction, wherein he set up that plaintiff's claim of title to the property in controversy was through a general warranty deed made to him by Charles C. Cobb and John M. Avery on November 25th, 1886, reciting a consideration of $1150.00. That said Cobb and Avery had purchased or bid in said land as the property of one John H. Payne at a marshal's sale thereof on September 7th, 1886, for the sum of $200.00. That said land at the date of both said sales was worth $10,000.00, and that its value was known to said Cobb and Avery when they conveyed to plaintiff. That said Cobb, who bid in the land for himself and said Avery, informed said defandant Cooke, who was present at said sale, that said Cobb and Avery would put said title so that suit might be brought thereon in the United States' Circuit Court. That said plaintiff, W. W. Avery, was a kinsman of the said John M. Avery, and that suit was brought in this case December 24th, 1886, in the name of said W. W. Avery by said Cobb and Avery; that said conveyance from said Cobb and Avery to said W. W. Avery, was without consideration and was feigned for the purpose of fraudulently conferring jurisdiction on the court; that said Cobb and Avery were, at the date of said purchase at marshal's sale, at the date of their con veyance to said W. W. Avery, and at the date of the institution of this suit, and at all times between said dates, citizens of the State of Texas, residing in Dallas county in said State, and had no right to prosecute suit in their own names in this court; that said suit was brought in the name of said W. W. Avery for the sole use and benefit of the said Cobb and Avery, and was a fraud

upon the jurisdiction of the court; that the jurisdiction of the court is predicated solely upon the citizenship of the parties; and said plea concluded with a prayer for leave to said defendant to withdraw his pleadings theretofore filed in the case, and that aforesaid plea be then filed and acted upon as a plea to the jurisdiction of the court. Aforesaid plea was sworn to by defendant, J. H. Cooke. (Printed Record, pp. 6 and 7).

Accompanying aforesaid plea was an affidavit by said Cooke, in which he stated that when this suit was brought and until the trial thereof, had at a former term of the court, he had supposed and believed that plaintiff W.W. Avery was a member of the firm of Deere, Mansur & Co., who were plaintiffs in the judgment under which the land in controversy was sold when Cobb and Avery purchased, and that the purchase by said Cobb and Avery was merely as counsel for said Deere, Mansur & Co., and that not until the then term of the court did he ascertain all the facts enabling him to make affidavit to the plea to the jurisdiction, filed with said affidavit. (Printed record, p. 6.)

On February 13, 1888, the court granted defendant's motion to withdraw his pleadings and file said plea to the jurisdiction (printed record, p. 7), which was accordingly done, and on the same day said defendant, not waiving his said plea to the jurisdiction, but subject to the same and only in the event the same was not sustained, answered, setting up: 1. not guilty; 2, purchase by defendant of the land in controversy from J. H. Payne without knowledge of any lien thereon, and pleading the same was Payne's homestead

and not subject to judgment liens in favor of the creditors of said Payne; 3, improvements in good faith to the amount of $11,900. (Printed record, pp. 7 and 8).

On February 11, 1889, plaintiff filed his second amended original petition. On this petition the case was tried. This petition, in addition to containing the substance of the two previons petitions, sought to show that there was involved in the case a federal question which would support the jurisdiction of the court regardless of the citizenship of the parties. To support this view it was alleged that one J. H. Payne was the common source of title. That defendant's claimed title to the property in controversy through a deed executed by said Payne and wife on January 2, 1886, and that plaintiff claimed title to said property through a judgment rendered on January 17, 1882, by the circuit court of the United States for the Northern district of Texas, at Dallas, in cause No. 198, against said Payne and in favor of John Deere, Charles H. Velie, Alvah Mansur and L. H. Tibbets, partners, under the firm name of Deere, Mansur & Co., which judgment had never been satisfied and was still in force; that an abstract of said judgment was made and on February 9, 1882, was properly and legally recorded and indexed in the office of the county clerk of Hunt county, Texas, which county was in the Northern district of Texas when said judgment was rendered and has been ever since.

That on March 3rd, 1882, an execution was issued on said judgment and duly returned not executed—no property found. That on August 11th, 1886, another execution was issued on said judgment under which the

marshal of said district, in accordance with law, on September 7th, 1886, sold said property in controversy to the said Charles C. Cobb and John M. Avery, and executed to them a deed, conveying to them all the estate, right, title and interest which the said Payne had on February 9th, 1882, or at any time thereafter, in afore said property.

That on November 25th, 1886, said Cobb and Avery by their deed, conveyed said property to plaintiff W. W. Avery.

Plaintiff then alleged that by virtue of certain laws of the United States and rules of the circuit court of the United States for the northern district of Texas, referred to in said petition, said judgment was a lien upon said property from the date of its rendition up to the sale by the marshal as aforesaid, and that by virtue of the same laws and rules, said judgment became a lien on said property on the date that the abstract thereof was recorded and indexed in said Hunt county, to-wit: On February 9th, 1882, and continued to be such lien up to the date of the sale by said marshal, and that by reason of said lien, plaintiff had the superior title to said property; that the validity of plaintiff's title depended upon the validity of said judgment lien on said property, and that defendants claimed that said laws of the United States and said rules of court had not been complied with, in creating and fixing said lien, but that said judgment never was a lien on said property; and this constituted the vital and controlling question in the case, and that plaintiff's title entirely depended on its correct decision; that the suit arose under the laws of the Uni-

ted States and the rule of said circuit court, and that said circuit court had at the institution of the suit, and still had jurisdiction of the cause without regard to the citizenship of the parties. (Printed Record, pp. 8 to 11, inclusive.)

On June 8th, 1889, defendant replied to said second amended original petition, by demurring to that portion thereof seeking to confer jurisdiction on the court, on the ground that a federal question was involved in the suit, and further pleaded that if defendants were not the owners of the property in controversy the title thereto was outstanding in one Y. D. Harrington, to whom it was conveyed by Payne, the common source, before the lien under which plaintiff claimed attached; and defendants further denied all the allegations in said petition. (Printed Record pp. 11 and 12.)

On the same day plaintiff filed his first supplemental petition, replying to defendants' motion and plea to the jurisdiction, and to his answer filed February 13th, 1888; as a reply to said plea to the jurisdiction, setting up, 1st, general denial; 2nd special demurrer, because said plea did not negative all the jurisdictional facts alleged in plaintiff's second amended original petition, and especially because it did not negative the facts upon which it was alleged the court had jurisdiction by reason of the federal question involved; 3rd, a general denial of the allegations of said motion. As a reply to said answer setting up, 1st. general demurrer; 2nd, special demurrers to the claim for improvements in good faith; 3rd, general denial. (Printed Record, pp. 12 and 13).

Under the rules of pleading in Texas, an amended pleading takes the place of and is substituted for the

pleading amended, and the adversary's reply to the old pleading remains a reply to the new pleading so far as applicable; so that upon the foregoing record the case stood for trial upon the following pleadings: "Plaintiff's second amended original petition," (Record, pp. 8 to 11); "Defendants' plea to the jurisdiction, (Record, pp. 5 and 7); "Defendant's original answer," (Record, pp. 7 and 8); "Defendants' first supplemental answer," (Record, p. 11); and "Plaintiff's first supplemental petition," (Record, pp. 12 and 13).

Said cause came on for trial June 8th, 1889, and the court having heard the several demurrers and exceptions, overruled defendants' exception to that portion of plaintiff's second amended original petition seeking to confer jurisdiction on the court, on the ground that a federal question was involved, and sustained plaintiff's demurrers and exceptions to defendants' plea to the jurisdiction; to which rulings of the court defendants excepted; and the court at the same time overruled plaintiff's exceptions to the defendants' original answer. (Record, pp. 22 and 23).

After the aforesaid action upon said demurrers and exceptions the trial of said cause was proceeded with, and the plaintiff to show title in himself as alleged, among other things offered in evidence certified copies of the abstract of aforesaid judgment against J. H. Payne and in favor of Deere and others, and of the index thereof as shown by the records of Hunt county, Texas. To the introduction of said abstract of judgment and index defendant objected; to the abstract, on the ground that it did not correctly give the name of the plaintiffs in said

judgment and did not show the amount still due thereon as required by law; and to the index on the ground that it did not give the names of the plaintiffs in said judgment, and that by reason of said defects the recording and indexing of said abstract did not create a lien; which objection the court overruled and admitted said abstract of judgment and index, and held that said abstract and index made said judgment a lien under the Revised Statutes of Texas, but did not pass on the question whether such lien existed independently of the Statutes of Texas; to which rulings of the court defendants J. H. and M. E. Cooke in open court excepted, and took their first bill of exceptions. (Record p. 16).

The plaintiff having introduced his whole evidence as shown on pages 13 to 18 of the printed record, and closed, defendants, Cooke and wife, stated to the court that no controversy arising under the laws of the United States had occurred or been presented in the trial, and thereupon by parol motion prayed the court to dismiss said cause for want of jurisdiction. It was admitted in open court that the court had no jurisdiction in this cause on the ground of citizenship of the parties, and that the court was without jurisdiction unless there was in the case a Federal question arising under the laws of the United States and rules of the circuit court, as alleged by plaintiff. Counsel for defendants suggested that such averments were made to confer jurisdiction evasively upon the court, and that the trial had demonstrated that said averments were untrue, and he moved the court orally to dismiss said cause for want of jurisdiction. Thereupon plaintiff's counsel offered to show, and de-

fendant's counsel admitted in open court the truth thereof, that upon a former trial of this cause in this court, defendant's counsel contended that by a proper construction of Article 916 of R. S. United States and rules of said circuit court, the laws of Texas as they existed in 1873 governed the lien of the judgment in this cause, and that by said laws the lien was invalid because executions had not been issued on such judgment each year since its rendition, as required by said law, (it being admitted by plaintiff that executions had not so issued), and that this was defendant's only contention on said trial in regard to the invalidity of said lien; that on said former trial plaintiff contended that the judgment lien in this case was governed by the Texas statute of 1879, and that this was the proper construction of aforesaid article 916 and said rules of court. That said lien was valid because by said statute of 1879 when execution issued within twelve months from the rendition of the judgment the lien remained in force for ten years without the issuance of any other executions. The court then overruled defendants' said motion to dismiss said cause, and defendants Cooke and wife in open court excepted, and took their second bill of exceptions. (Record p. 18).

Defendants Cooke and wife, to support their plea of outstanding title, then offered in evidence a deed of general assignment from J. H. Payne to Y. D. Harrington for the benefit of the creditors of the said Payne, made October 16th, 1880, under the assignment laws of Texas, the introduction of which deed was objected to on several grounds, which will hereafter be stated, so far as pertinent or material to the questions involved, which objec-

tions the court sustained and excluded said deed, to which ruling said defendants, Cooke and wife, in open court excepted, and took their third bill of exceptions. (Record pp. 19 and 20.)

Said defendants then offered in evidence aforesaid deed of assignment, for the purpose of showing that the the legal title was not before the court; to this plaintiff objected on all the grounds set out in third bill of exceptions, and on the further ground that defendants having pleaded an outstanding title, could not prove any other defense; all of which objections the court sustained and excluded said instrument, and defendants in open court excepted and took their fourth bill of exceptions. (Record p. 20.)

Defendants Cooke and wife, then offered in evidence, to prove their title to the land in controversy, the original deed from J. H. Payne and wife to said J. H. Cooke, dated January 2nd, 1886; to the introduction of this deed for this purpose, plaintiff objected, on the ground that defendants having specially pleaded an outstanding title, could not prove title in themselves. This objection was sustained by the court and the deed excluded; to which ruling said defendants in open court excepted, and took their fifth bill of exceptions. (Record p. 20.)

Defendants, Cooke and wife then offered in evidence said deed from Payne and wife to said Cooke under their plea of improvements in good faith, and to its introduction for this purpose plaintiff objected, on the ground, among others, that this suit having been commenced December 24th, 1886, and this deed being dated January 2nd, 1886, defendants could not have held adverse pos-

session of said land in good faith under a claim of title, for more than twelve months before the commencement of the suit; and the court sustained said objection and excluded said deed, and defendants then, in connection with said deed, offered to show that in October, 1885, defendant Cooke and the said J. H. Payne agreed by parol upon the terms of the trade afterwards carried out by said deed dated January 2nd, 1886, and that Cooke went into immediate possession, holding adversely and in good faith, and began to improve the land as his own, and before he heard of said judgment had made improvements thereon to the value of $10,000.00, and to that extent had enhanced the value of the land. Plaintiff objected to the introduction of this evidence, on the ground that a parol contract formed no basis for a claim for improvements, which objection the court sustained and excluded the evidence, and defendants, in open court excepted and took their sixth bill of exceptions. (Record, pp. 20 and 21).

Defendants, Cooke and wife then offered to prove that from January 1st, 1882, until the sale of said land in controversy to Cooke, that said Payne was the head of a family, consisting of a wife and children, and that said land in controversy was the homestead of said Payne and was at no time subject to the judgment lien, execution, levy and sale through which plaintiff claimed. To this evidence plaintiff objected, on the ground that defendant having pleaded an outstanding title could prove no other defense. This objection, the court sustained and excluded the evidence, and defendants in open court excepted and took their seventh bill of exceptions. (Record, p. 21).

All parties having closed their evidence, the entire substance of which is set out in foregoing seven bills of exceptions, the court instructed a verdict for plaintiff for the land in controversy and for value of the rents and profits from November 25, 1886 to the date of trial; to which instruction the defendants Cooke and wife excepted on the grounds of error pointed out in their seven foregoing bills of exceptions, and took their eighth bill of exceptions. (Record p. 22).

Pursuant to said charge the jury returned into court the following verdict: "We, the jury, find for plaintiff title to the land in controversy and damages, in the sum $2638.12 1-2," on which verdict the court entered judgment in favor of plaintiff and against said J. H. and M. E. Cooke and the Scottish American Mortgage Company, limited, for the land in controversy with all fixtures and permanent improvements thereon; and against J. H. and M. E. Booke for said $2638.12 1-2 with eight per cent interest thereon from date, and for costs. (Record p. 23).

The defendant, the Scottish-American Mortgage Company, limited, declining to prosecute a writ of error to said judgment, defendants J. H. Cooke and M. E. Cooke obtained a severance and authority to prosecute a writ of error independent of said company. (Record p. 24.) And thereupon on June 17, 1889, said defendants J. H. and M. E Cooke sued out a writ of error to the said judgment, which was issued and perfected in accordance with law. (Record pp. 24 to 28). On July 15, 1889, defendants Cooke and wife filed in the court below the following assignment of errors, to-wit:

1. "The court below erred in overruling the demur-

rer of defendants' (plaintiff's in error) to that part of plaintiff's petition intended to set up in said cause a controversy arising under the laws of the United States, and thus to confer jurisdiction independent of the citizenship of the parties, and in sustaining the exceptions of plaintiff (defendant in error) to the plea of defendants that such title as the plaintiff appeared to have was apparent and colorable only, and so put in him by citizens of Texas fraudulently to impose upon said court jurisdiction of a cause not properly cognizable therein.

2. The court below erred in admitting in evidence the certified copy from the registry of Hunt county of the abstract of judgment and index to the record thereof, under which plaintiff below claimed, over defendant's objection thereto, and in holding that said abstract and index conferred upon said judgment a lien upon the land in controversy, as shown by bill of exception No. 1.

3. The court below erred in refusing to dismiss this suit for want of jurisdiction upon defendants' suggestion and motion, after the plaintiff had closed his testimony, and no controversy arising under the laws of the United States had been presented, and the plaintiff had in open court admitted that jurisdiction could not be sustained on the ground of the citizenship of the parties, as shown by bill of exception No. 2.

4. The court below erred in excluding as evidence of outstanding title the deed from J. H. Payne to Y. D. Harrington, as shown by bill of exception No. 3.

5. The court below erred in excluding said deed when offered by defendants to show that the legal title

to the land in controversy was not before the court, as shown by bill of exception No. 4.

6. The court below erred in excluding the deed from J. H. Payne and wife to defendant, J. H. Cooke, when offered as evidence of defendants' title to the land in controversy, as shown by bill of exception No. 5.

7. The court below erred in excluding said deed and the other evidence offered with it in support of defendants' plea of improvements made by them upon the land in good faith, as shown by bill of exception No. 6.

8. The court below erred in excluding proof offered by defendants, that the land in controversy, during the time when plaintiff claimed there was a judgment lien upon it, was the homestead of J. H. Payne and wife and not subject to such lien or to execution sale, as shown by bill of exception No. 7.

9. The court below erred in instructing the jury to return a verdict for plaintiff, as shown by bill of exception No. 8.

10. The court below erred in directing any verdict or rendering a judgment against defendant, M. E. Cooke for damages, the proof showing no liability upon her part.

11. The court below erred in rendering judgment for damages against J. H. and M. E. Cooke only, when the plea, proof and verdict were equally against all the defendants."

To present intelligibly the questions raised by the first assignment of error, it will be necessary to make a more elaborate statement of the parts of the record in-

volved, than has been given in the foregoing statement of the case.

As required by section 914 of the Revised Statutes of the United States, the case was pleaded in the court below, in conformity to the rules governing in the State courts. Rule 13, to be found in the appendix to 47 Texas at page 618, requires that when any pleading is to be amended, the whole with the changes or additions desired, shall be reproduced. The amendment takes the place of the pleading amended and the latter ceases to be a part of the record, (rule 14) unless it is kept in the record by bill of exception or otherwise.

The pleading on the part of the plaintiff consisted, first, of an original petition, which was filed December 24th, 1886. Second, of a first amended original petition, which was filed January 13th, 1888, and third, of a second amended original petition, which was filed February 11th, 1889, (Record pp. 1–2–4–5–8–11). Under therule of pleading above referred to, the second petition superseded the first, and the third petition superseded the second.

The motion and plea of the defendant, Cooke, to the jurisdiction, was filed February 8th, 1888, (Record pp. 6 and 7) which was after the first and second pleadings of the plaintiff had been filed, and this plea to the jurisdiction, it is stated under oath, that the jurisdiction of the circuit court is predicated solely on the citizenship of the parties. It thus appears that the claim that the court below had jurisdiction, on the ground that there was in the case a controversy arising under the laws of the United States, was first presented by the plaintiff in his second amended original petition, the pleading on which the case was tried.

In this second amended original petition, after making the averments usual in actions of trespass to try title, the plaintiff alleged: "That both plaintiff and said defendants derive title to the above property from one J. H. Payne, as a common source of title, said defendants claim title to said property from said Payne through a certain deed executed by said J. H. Payne and wife, V. A. Payne, on the 2nd day of January, 1886; plaintiff claims title to said property as follows: On the 17th day of Jan., 1882, in cause No. 198, in this Honorable Circuit Court of the United States for the Northern District of Texas at Dallas, (which court had full jurisdiction of said cause and of the parties thereto) John Deere, Chas. H. Deere, S. H. Velie, Alvah Mansur and L. H. Tibbets, partners under the firm name of Deere, Mansur & Company, recovered a judgment against said J. H. Payne for the sum of $717.93 and costs of suit, which judgment has since remained in full force and effect and unsatisfied, except as partly satisfied by the sale under execution of said property as hereinafter stated: On said date said property was and has ever since remained within said northern district of Texas and within the jurisdiction of this Honorable Circuit Court. On the 6th day of Feb., 1882, the clerk of this circuit court made and out delivered to said Deere, Mansur & Company an abstract of said judgment, which abstract was made out according to the laws of Texas, for fixing and securing the lien of judgments, and said abstract on February 9th, 1882, was filed in and immediately recorded in the office of the county clerk of said Hunt County, Texas, in the judgment record book of said county, and was on said date

also entered upon the index of said judgment record in a proper and legal manner, all of which was done in accordance with the laws of Texas, for fixing and securing judgment liens. On March 3rd, 1882, an execution issued from said circuit court on said judgment, which was returned to said court by the marshal of said Northern district of Texas, "not executed. No property found." On August 11th, 1886, another execution was issued on said judgment by said clerk of said circuit court and on the 7th day of September, 1886, by virtue of said execution said marshall of said Northern district of Texas, in accordance with law, sold said property at public auction to Chas. C. Cobb and John M. Avery, and executed to them a deed therefor, conveying to them all the estate, right, title and interest which said J. H. Payne had on the 9th day of February, 1882, or at any time thereafter, of, in, and to the above property, and on November 25th, 1886, said Cobb and Avery, by their deed conveyed said property to the plaintiff, W. W. Avery, all of which deeds have been duly recorded in said Hunt county. Plaintiff further shows that by virtue of a law of the United States approved September 24th, 1789, and contained in the Revised Statutes of the United States, section 721, and another law of said United States, approved June, 1872, and contained in Revised Statutes of the United States, section 916, and by virtue of the other laws of the United States contained in chapter 18 of said Revised Statutes of the United States, and by virtue of two rules of this honorable circuit court, to wit: Rule No. 1 adopted at Dallas, April 2nd, 1880, and adopting the modes of proceedings prescribed by the laws of

Texas, and Rule No. 1, adopted at Dallas, July 26th, 1881, and adopting as the rule of practice of this court the laws and rules of procedure and practice prescribed by the laws of Texas as they now exist, or as they may be changed or amended from time to time, said judgment was a lien upon said property from the date of the rendition thereof up to the sale thereof by said marshal; plaintiff further alleges that by virtue of the above mentioned laws of the United States and the above mentioned rules of this circuit court, said judgment became a lien on said property on the date that the abstract thereof was recorded and indexed in said Hunt county, to-wit: February 9th, 1882, and continued to be such lien up to the sale of said property by said marshal as aforesaid, and by reason of said lien plaintiff has superior title to said property; plaintiff further alleges that his title depends on the validity of said judgment lien, which he avers was a valid and binding lien on said property, at date of said sale by said marshal, but said defendants herein claim that the laws of the United States and the rules of this court were not complied with in creating and fixing said judgment lien, and they deny that said judgment was a valid lien on said property, and this constitutes the main and vital and controlling question in this case, and plaintiff's title entirely depends on the correct decision of said question; plaintiff further alleges that this suit arises under the laws of the United States, and the rules of this honorable court, and this honorable circuit court had at the institution of this suit and has still jurisdiction of said suit without regard to the citizenship of the parties thereto." (Record, pp. 9–11).

To this plea the defendants, "Cooke and wife," demurred, by supplemental answer filed June 8th, 1889, on the ground that the averments above quoted were not sufficient to show a controversy arising under the laws of the United States. And on the same day the plaintiff, by supplemental petition, demurred to the motion and plea of the defendant to the jurisdiction, on the ground that said plea did not negative the averments above quoted from plaintiff's petition, intended to give jurisdiction independent of the citizenship of the parties.

The defendant's demurrer was overruled and the plaintiff's demurrer to the plea to the jurisdiction was sustained.

The correctness of these rulings is challenged by the first assignment of error.

If the averments quoted at length were sufficient to show that there was in the case a "real and substantial" controversy arising under the laws of the United States, the defendant's demurrer was properly overruled. And if there was such controversy shown by the plaintiff's pleading, then the defendant's plea to the jurisdiction was demurrable, because, though true, it did not defeat the jurisdiction.

The correctness of both rulings therefore depends upon the sufficiency of the quoted averments, to show a controversy arising under the laws of the United States —a real and substantial controversy, which under the law, as interpreted by this court, will confer jurisdiction upon the circuit court of suits between citizens of the same state.

What then is the controversy, and does it arise under the laws of the United States? are the questions to be decided.

The controversy is sharply defined. "The main and vital and controlling question" is, was the judgment against Payne, the common source of title, a lien upon the land?

To determine whether this controversy arises under the laws of the United States, requires a closer examination.

The plaintiff alleges that the judgment against Payne was *two* liens upon the land.

1st. A lien dating from the rendition of the judgment and lasting to the date of the marshal's sale.

2nd. A lien dating from and caused by the registration and indexing of the abstract of the judgment and continuing to the marshal's sale. We have been unable to formulate any theory on which the first of these liens can be maintained. No law of the United States has ever directly made Federal judgments a lien upon land. The lien has been given only through the adoption of the state laws. Since long before the date of the judgment against Payne, there has been no law in force in Texas which made any judgment a lien from its date.

It may be that the lien from date of judgment, which is the one now under discussion, is claimed under the Texas act of November 9th, 1866. *2nd Paschal's Digest of the laws of Texas, Art. 7005.* But that act was superseded and repealed by *Chap. I, of title 61 of the Revised Civil Statutes of Texas.* If it was kept in force as to Federal judgments by some Federal law, as *Sec. 916 of*

United States Revised Statutes, the facts on which the lien, would continue in force long enough for the plaintiffs use, are not averred.

It is settled by a long line of decisions of the Supreme Court of Texas that the judgment lien under the act of 1866, ceases whenever there is an interval of one year between the issue of executions.

Anthony vs. Taylor, 68th Tex., 403. It is also adjudged that the burden of showing the due issue of execution is upon the party asserting the judgment lien. *Greener vs. Westin, 66th Texas, 209.*

And when a plaintiff undertakes to allege his title, he must aver every fact, the proof of which is essential to his case. *Edwards vs. Bardwise, 69th Tex., 84.*

The Federal judgment would cease to be a lien in the same way and time that the state judgment would. *United States Revised Statutes, Sec. 967.*

The plaintiff alleged that an execution was issued on the judgment against Payne in 1882, and another in 1886, and alleges none in the interval. The plaintiff therefore had no lien under the act of 1866 on his own averments and hence his pleadings cannot show a real and substantial controversy over the existence of that lien. As more than a year elapsed from the date of the execution in 1882 to the date of the alleged conveyance by Payne to Cooke, the lien had ceased at the time when it must have existed to show that the plaintiff had any title. As to the act of 1866 the petition shows no real and substantial controversy at all, under any of the laws of the United States.

The act of 1866 and that of 1879 contained in the Revised Statutes of Texas are the only laws of the State which can possibly be applied to the case by any construction of any law of the United States. If the act of 1866 does not apply, the act of 1879 is the only law of Texas which bears upon the lien of the judgment. The latter law gives the lien only when an abstract is duly certified, duly recorded and duly indexed in accordance with its provisions. If then a lien is claimed from the *date* of the judgment under the act of 1879, it must be upon the idea that a Federal judgment becomes a lien from its date, without compliance with any precedent conditions of the state law, whenever under the state law a judgment of the state court may under any circumstances or upon any conditions be made to operate as a lien.

It is submitted that this proposition is without the support of any authority and wholly untenable.

To this question the cases in which the state law makes the judgment itself operate as a lien, have no application.

In the case of Massingill vs. Downs, 7 Howard, 760, the state law made the judgment a lien upon all the land of the debtor in the county, and to extend the lien to land in other counties it was required that the judgment should be recorded in other counties. It was held that the Federal judgment was a lien on all the land in the district, without such record. The lien was regarded as a remedy for the enforcement of the judgment and hence co extensive with the process of the court. The adopted state law made the judgment a lien and the process laws of the United States defined its scope.

In the case of United States vs. Humphreys, 3 Hughes C. C., 201, the adopted state law made the judgment a lien, and it was held that another section of the law requiring the judgment after its lien has attached to be docketed in the county where the land lay in order to make the lien effective against subsequent innocent purchasers, did not apply to a Federal judgment.

These and other similar cases that may be found, show that when the Federal judgment becomes a lien, the state laws regulating the extension and continuance of the lien of state judgments may not be applied. There may be a diversity of opinion as to how far the state laws regulating the lien, after it has once attached, have been adopted by any Federal law (see Thompson vs. Phillipps, 1 Baldwin, C. C., 246); but no case can be found in which it has been held that a Federal judgment has become a lien without those things being done, which the state law requires to be done to *originate* the lien.

When under the state law the mere rendition of a judgment originates the lien, other state laws providing for the docketing or registration of the judgment may be dispensed with, but when under the state law the judgment is not a lien at all for any purpose or to any extent, *until* the judgment is docketed or recorded, or an abstract is registered and indexed, then until this is done the Federal judgment is not a lien.

Hence, it is held by this court that if the lien under the state law commences when process is issued (Burton vs. Smith, 13 Peters, 464), or when one kind of process is authorized upon the return of another not satisfied, (United States vs. Morrison, 4 Peters, 124), or when the

lien begins only after the record of the verdict (Gunn vs. Plant, 94 U. S. 664), the lien of the Federal judgment commences only on the same conditions.

In applying state laws to a system, for which they were not devised, incongruities may arise and a literal application may be impracticable. In adopting such state laws to Federal judgments the scope of construction in making a practical application would be necessarily larger than if the object of construction was merely to ascertain the meaning of the state law. But this is not the case with the Texas law of 1879 (R. S. Chap. I, Title, 61). By that law the judgment is never *per se* a lien. It becomes a lien *only and not until* an abstract of it is certified, registered and indexed. And then every difficulty in the application of it to the Federal judgments is removed by an express provision for their registration and indexing in the same way with judgments of the state court.

If then this act of 1879 was adopted by any Federal law or rule of court, the lien claim from the *date* of the judgment against Payne did not exist. The petition shows that the abstract of the judgment was made, registered and indexed subsequent to the date of the judgment.

As already stated, it is claimed in the petition that the judgment was two liens on the land; one dating from the rendition of the judgment, and the other from the date of the registration and indexing of the abstract of the judgment.

The purpose thus far has been to show that on the face of the petition the first of these liens did not exist.

Over this lien then there can be no real and substantial controversy arising under the laws of the United States.

In directing a verdict and rendering judgment for plaintiffs, the court below held that the judgment against Payne was made a lien by the registration and indexing of the abstract under act of 1879, and did not pass upon the question whether the other lien from rendition of judgment existed or not. It may therefore be assumed that the circuit court did not sustain its jurisdiction on the ground that there was any controversy arising under the laws of the United States over the lien claimed by the plaintiff to have originated with the rendition of the judgment. As the court expressly declined to decide whether any such lien existed or not, any controversy about the lien was necessarily regarded, as it was treated, as immaterial to the decision of the case, whereas the controversy conferring jurisdiction must be essential to the decision of the case. (Shreveport vs. Cole, 129 U. S., 36).

The jurisdictional controversy must therefore be found, if at all in respect to the lien, claimed to have arisen from the registration and indexing of the abstract of the judgment against Payne. To that lien we now invite the court's attention.

The plaintiff alleges compliance with the act of 1879 in registering and indexing the abstract and asserts the consequential lien; he then avers that "the defendants herein claim that the laws of the United States and the rules of this court were not complied with in creating and fixing said judgment lien" and they deny the lien. No law of the United States and no rule of court pre-

scribes how the lien is to be created or fixed, except by adopting the state law. The averments mean then that there was a controversy between the parties as to whether the adopted state law had been complied with in creating and fixing the lien. To determine that controversy we know of no law of the United States to be construed, nor any rule of court.

The Federal laws and rules of court would have to be referred to and might have to be construed to ascertain what state law has been adopted and was applicable in creating and fixing the judgment lien. But it is not avered that there was any dispute between the parties or room for a difference as to what state law had been adopted. If such a dispute existed and was relied on to confer jurisdiction, it ought to have been pleaded according to the rules laid down by this court in Shreveport vs. Cole, 129 U. S., 36, and Gold Washing & W. Co. vs. Keys, 96 U. S., 199. What state law each party claimed had been adopted and by what Federal law should have been averred, that the court might judge whether the controversy, as well as the averment of citizenship, was not a pretence, fraudulently to confer jurisdiction. (Morris vs. Gilmer, 129 U. S., 315).

We submit that the demurrer questioning the sufficiency of the averments of the petition to show a controversy arising under the laws of the United States ought to have been sustained.

This would have left the jurisdiction of the court dependent upon the citizenship of the parties pursuing the practice prevailing prior to the act of March 3, 1875, the defendants after discovering that the title had been

fraudulently put in the plaintiff to impose upon the jurisdiction of the court, obtained leave to withdraw their answers to the merits and pleaded to the jurisdiction. The presentation of the issue in the record at any time, not depriving the plaintiff of an opportunity to meet it, was sufficient and the plaintiff's demurrer to the plea ought to have been overruled. (Morris vs. Gilmer, 129 U. S., 315).

We submit that the first assignment of error is sustained by the record and the law.

But that assignment is sustained by another vein of the record which will be briefly presented.

There are two kinds of controversies, which may arise under the laws of the United States. One is over a right which depends directly upon the construction of a law of the United States, the other is over a right claimed under authority exercised under the United States.

A controversy of the first kind confers original jurisdiction upon the circuit court. A controversy of the second class entitles the party asserting the right, if it be denied by the state court of last resort, to have the question passed upon by this court. The distinction between the two is clearly pointed out by this court in the case of Carson vs. Durham, 121 U. S., 427.

In this case the controversy is over a judgment lien. No law of the United States is directly involved, because no such law creates the lien. The lien is claimed under an authority exercised under the United States, and depends not upon the construction of any particular law of congress, but upon the exercise of the authority—the proper doing of the things authorized to inaugurate the lien.

The case of Carson vs. Durham, makes it unnecessary that I should elaborate this point any further.

The third assignment of error relates to the jurisdiction of the circuit court, and it may be considered here more appropriately than in its numerical order.

In the introduction of plaintiff's evidence but one objection was made and one question arose. The certified copy of the abstract and index from Hunt county, was objected to, on the ground that they were not in compliance with the Texas law of 1879. The objection was overruled, and the court held that the law was complied with, and that the judgment thereby became a lien. Whether the judgment was a lien independent of that law, was not passed upon. All testimony offered by the defendants was excluded by the court, upon objections not arising under nor involving any law of the United States. It was admitted that the jurisdiction of the court could not be sustained on the citizenship of the parties.

After the rulings upon the demurrers, all of which, involving the jurisdiction of the court, have been discussed under the first assignment of error, there was not presented in the trial, nor did there arise any question under the laws of the United States, nor was any such question decided. Accordingly when plaintiff had introduced his evidence and rested his case, defendants moved the court to dismiss the suit for want of jurisdiction.

It is not sufficient to confer jurisdiction on the circuit court under the act of 1875, to *plead* the jurisdictional controversy—it must actually exist in the case

and "it is made the duty of the circuit court to dismiss the case whenever it appears that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction." (Shreveport vs. Cole, 129 U. S., 44). How is such a controversy involved, when in the whole trial it neither arises nor is presented, nor is passed upon by the courts.

But when this motion was made to dismiss, the plaintiff proposed to prove, and the fact was admitted, that on a former trial of the case defendant's counsel "contended before the court that by a proper construction of section 916, U. S. Revised Statutes and the rules of this court adopted in pursuance thereof, the laws of Texas, as they existed in 1873 in regard to judgment liens governed the lien" of the judgment against Payne, and that under the laws of Texas in force in 1873, the lien had been lost by the failure to issue execution from year to year which it was admitted had not been done; while plaintiff, on the other hand, contended that under section 916 and the rules of the court, the Texas law of 1879 was the law by which the lien was to be tested. The court overruled the motion to dismiss and the defendants saved the point by a proper bill.

Section 5 of the act of March 3rd, 1875, requires the circuit court to dismiss the suit whenever *either* the jurisdictional controversy is not involved, *or* the parties are collusively made to give jurisdiction. In this case it appears by the admission of the plaintiff that the parties were collusively made to impose upon the jurisdiction of the court, and that it was not until this fraud was discovered by the defendants and exposed by a plea that an

attempt was made to allege a controversy arising under the laws of the United States. If a literal construction is the correct interpretation of section 5 of the act of 1875, the defendant's motion to dismiss should have been sustained, whether there was in the case any controversy arising under the laws of the United States or not. It has already been shown that there was no avarment of such a controversy until the second amended original petition was filed.

From December 24th, 1886, until February 11th, 1889, more than three years, the case was pending in the circuit court without disclosure by the record of the only matter which, as shown by admissions at the trial, could have given the court any jurisdiction of the case. Under these circumstances it is submitted that the motion to dismiss should have prevailed, if there was such a controversy as would confer jurisdiction independent of the citizenship of the parties, it should have been averred at the time the jurisdiction was invoked—at all events, before the exposure of the fraud by which for three years it was sought to impose jurisdiction.

But we submit that if it had been presented in proper time, there is shown by the record no such controversy as would confer jurisdiction.

What then is the controversy which prevented the dismissal of the suit?

In the first place it was one presented at a former, and not the final trial of the case. How or why it disappeared from the case, or did not recur in the final trial, is not shown by the record. What issues were then in the case and what the state of the pleadings were, making that

controversy material in the former trial, does not appear. But as the circuit court held that the lien was secured under the Texas law of 1879, it may be assumed that the defendants' counsel abandoned his contention made at the former trial, that the law of 1879 did not apply, and the controversy as to what state law did apply, thus passed out of the case. Why this contention was abandoned may be surmised when the rules of the court introduced in evidence are examined.

A question might be raised as to whether the jurisdiction of the court would survive, after the jurisdictional controversy has ceased to be in the case, but I pass on to the question whether the controversy presented, was ever such as gave jurisdiction.

The controversy was as to what state law was adoped by Sec. 916 and the rules of court.

There can be no substantial dispute as to the construction of Sec. 916. Of its own force it adopted the state law, which was in force when it was originally enacted in 1873. This is the plain meaning of the language employed, and is the construction settled by repeated decisions of this court. (Lamaster vs. Keeler, 123 U. S., 376. Ex parte Boyd, 105 U. S., 647. C. & C. St. R. R. Co. vs. Hart, 114 U. S., 654.)

It makes no difference whether the state law of 1872 or 1873, was adopted by Sec. 916, because the same state law, the act of 1866, was in force in both years.

Nor is there any room to question that Sec. 916 conferred upon the circuit courts the power by rule to adopt subsequent state legislation. The constitutionality of a law giving the courts such authority, has been settled

in this country and by this court, for more than sixty years. (Wayman vs. Southard, 10 Wheaton, p. 1. Lamaster vs. Keeler, 123 U. S., p. 376.)

No real or substantial controversy could arise over the construction of any part of Sec. 916. There can be no possible ground for apprehending that any state court would attach to that section any meaning, other than that plainly expressed by its words and settled by the authoritative adjudications of this court. No jurisdictional controversy can therefore arise under this law. Shreveport vs. Cole, 129 U. S., 36. Controversy has been silenced by authentic construction. Kansas vs. Bradley, 26 Fed. Reporter, 289.

The act of 1866 applied, unless the subsequent law of 1879 has been adopted by the rules of court. If then there was a controversy as to what state law applied, its solution depends, not upon the construction of Sec. 916, but upon the existence and meaning of the rules of the circuit court.

Now it is submitted with confidence, upon the authority of Carson vs. Dunham, 121 U. S., 421, that the lien claimed by the plaintiff is claimed "under an authority exercised under the United States," and not depending directly upon the construction of any law of the United States. The question is not what any law means, but what in the exercise of the authority conferred by the law, the courts and the parties have done.

Authorizing the courts by Sec. 916 to make rules is not a delegation of the power of congress to enact laws. The rules of court are not laws of the United States A right dependent upon the meaning of the rules is de-

pendent upon an authority exercised under the United States, and not a right sustained by one construction of a law of the United States, and defeated by another.

But if the dispute over the meaning of the rule is to be treated as a controversy over the construction of a law of the United States, it is then submitted that the dispute was frivolous, and not such a real and substantial controversy as would confer jurisdiction.

The first rule offered in evidence was adopted April 2, 1880, and provided as follows: "The modes of proceedings prescribed by the laws of Texas, when they do not conflict with the laws of the United States or a rule of the supreme court of the United States or of this court, are adopted."

There is no room for controversy over the meaning of the phrase "modes of proceedings," in this rule. Section 914 had already adopted all the modes of proceeding prescribed, or as they should thereafter be prescribed by state laws, except the proceedings for the enforcement of judgments. The modes of proceeding prescribed or to be prescribed by the state law, except those for the enforcement of judgments, had been adopted, "any rule of the court to the contrary notwithstanding." The court was without power by rules to affect the modes of proceeding adopted by section 914.

It has been settled by this court that the expression "modes of proceeding," embraces remedies for the enforcement of judgments. Lamaster vs. Kulu, 123 U. S., 376. These remedies are provided for in section 916, and that section expressly authorizes the courts by rule to adopt subsequent state laws relating to the enforcement of judgments.

It is to be presumed that the court, in adopting the rule intended to act by authority of law, to-wit: Section 916.

(2) That it did not intend to adopt laws already adopted, to-wit: Those prescribing modes of proceeding other than remedies upon judgments.

(3) That it did intend to adopt laws it was authorized to adopt, to-wit: Those prescribing modes of proceeding for the enforcement of judgments; and

(4) That it intended to adopt laws not theretofore adopted, to-wit: Remedies upon judgments prescribed subsequent to the enactment of section 916.

It is thus demonstrable that the above rule did adopt the act of 1879 in relation to judgment liens.

This court will now suspect why counsel for defendant abandoned the contention that the act of 1879 had not been adopted by the rules of court and will readily approve his course in not persevering in a controversy, for which there was no "real or substantial" basis. The charitably disposed would probably surmise that counsel taking such a position, as was taken by counsel for defendants at the former trial, had been employed after the trial commenced and acted on the instant.

It is certainly clear that the rule does adopt the act of 1879, and it is also clear that over this proposition there can be no real and substantial controversy, such as would confer jurisdiction, even if the rule was a law of the United States, and not a mere authority exercised under the United States.

The record in this court shows the whole case as presented in the court below. The bills of exception

state that they contain all the evidence introduced upon the trial. We submit to the court there was no right or claim involved in the suit, which would be sustained by one construction of any law of the United States and defeated by another, and that in the whole case no real or substantial controversy can be found sustaining the jurisdiction of the circuit court.

If the first or third assignment is sustained, those which I am about to present, do not require the attention of the court.

The second assignment is that "The court below erred in admitting in evidence the certified copy from the registry of Hunt county, of the abstract of judgment and the index to the record thereof, under which the plaintiff below claimed, over defendant's objection thereto, and in holding that said abstract and index conferred upon said judgment a lien upon the land in controversy, as shown by bill of exception No. 1."

The act under which a lien was claimed, is Chap. 1, of Title 61 of the Revised Civil Statutes of Texas, and the parts material to this case are as follows:

"Art. 3153. Each clerk of the county court shall keep in his office a well bound book, to be called 'The Judgment Record,' in which he shall record all abstracts of judgments filed in his office for record, which are authenticated in the manner hereinafter required."

"Art. 3154. It shall be the duty of each clerk of a court, when the person in whose favor the judgment was rendered, his agent, attorney or assignee, applies therefor, to make out and deliver to such applicant, upon the payment of the fee allowed therefor by law, an abstract

of such judgment and certify thereto under his hand and official seal."

"Art. 3155. The abstract provided for in the preceding article shall show:

"1. The names of the plaintiff and of the defendant in such judgment.

"2. The number of the suit in which the judgment was rendered.

"3. The date when such judgment was rendered.

"4. The amount for which the same was rendered, and the amount still due upon the same.

"5. The rate of interest, if any is specified in the judgment."

"Art. 3157. When any such abstract, as is provided for in the three preceding articles, is presented to the clerk of the county court for record, he shall file and immediately record the same in the judgment record, noting in such record the day and hour of such record, and shall also at the same time enter it upon the index."

"Art. 3158. The index to such judgment record shall be alphabetical, and shall show the name of each plaintiff and of each defendant in the judgment, and the number of the page of the book upon which the abstract is recorded."

"Art. 3159. When any judgment has been recorded and indexed, as provided in the preceding articles, it shall, from the date of such record and index, operate as a lien upon all the real estate of the defendant situated in the county where such record and index are made, and upon all real estate, which the defendant may thereafter acquire, situated in said county."

"Art. 3160. When a lien has been acquired as provided in this chapter, it shall continue for ten years from the date of such record and index, unless the plaintiff shall fail to have execution issued upon his judgment within twelve months after the rendition thereof, in which case said lien shall cease to exist."

"Art. 3163. An abstract of a judgment rendered in this state by any United States court, may be recorded and indexed in the same manner provided for the judgments of the courts of this state, upon the certificate of the clerks of such United States courts, and the record and index of such judgments shall have the same force and effect as that of a judgment of a court of this state."

There would seem to be little occasion to construe this statute. What the abstract shall contain is set forth with great particularity. The first thing required is the names of the parties. The fourth requisite is the amount of the judgment *and* the amount still due on same.

The abstract admitted in evidence complied with neither of these requirements.

But before it may operate as a lien the abstract of the judgment must be indexed. This is emphazied in the statute. In every instance it is provided that the lien is to begin only when the abstract has been recorded *and* indexed. How the abstract is to be indexed is the subject of a separate article. It is to be alphabetical and to contain the name of *each plaintiff* and *each* defendant. "This means that each name must appear in the index in its alphabetical order." Gullett Gin Co. vs. Oliver & Griggs, 78 Tex., 182-186.

In the case jnst cited the judgment was in favor of the Gullett Gin Co. against Mitchell & Scruggs, rendered by the United States circuit court at Dallas, Texas. The land on which the lien was asserted was the property of Mitchell & Scruggs, a partnership; the abstract was indexed only in their firm name, and it was urged that as to partnership lands the statute was sufficiently complied with, but the court held "that the lien is created only by a compliance with the terms of the statute in every substantial particular at least, and that the indexing in the name of each member of the defendant partnership is a matter of substance and essential to the existence of the lien." It is to be observed that the statute requires the names of *each* plaintiff in precisely the same way that it does the names of each defendant to be alphabetically indexed, and that the ruling in the above case is that that requirement is not complied with by an indexing in the firm name. No stress is laid upon the fact that the defect in the index was in the names of the defendants in the judgment.

In the case of Anthony vs. Taylor, 68 Tex., 403–405, there was a mistake in the names of the plaintiffs in the abstract—the judgment was in favor of Joan and Wm. Bankhead—and in the abstract the names were given as Joan and Wm. Burkhead, and this difference, although the names of the defendants were correctly stated, was held fatal to the lien.

In the case of Pierce vs. Wimberly, 78 Tex., the judgment involved was rendered in the U. S. Circuit Court, for the Eastern District of Texas, in favor of August, Bernheim & Bauer against Geo. Yarbrough and

W. C. Pierce, Sr. The abstract gave the individual names of both plaintiffs and defendants. The index showed only the plaintiffs' firm name and gave the defendants' as Yarbrough and Pierce. When the index was offered in evidence it was objected to on this ground, and on appeal the Supreme Court says: "The evidence should have been excluded. The Revised Statutes direct that the index shall show the name of each plaintiff and of each defendant in the judgment."

There might be put some good reasons why the legislature should have been less particular about the names of the plaintiffs than those of the defendants in the index. But when the requirement as to both is in the same language and in the same sentence, the courts can make a distinction only by legislation—not by construction. "As the lien is the creature of the statute, it follows that until the conditions to the lien fixed by the statute have been complied with, the lien is not established. The indexing so carefully described and provided for, cannot be dispensed with by the courts. The terms used in the statute are simple and clear. The meaning and intent are expressed. It is not for the courts to question the policy of the law. They can only apply it to a state of facts ascertained, when rights are litigated and the jurisdiction of the courts invoked." Nye vs. Moody, 70 Tex., 434.

In the light of these authorities, I will now present the abstract and index offered in evidence by the plaintiff below and admitted over the defendants' objections.

The judgment, under which the lien was claimed, was rendered in the court below in favor of John Deere,

Chas. W. Deere, S. H. Velie, Alvah Mansur and L. H. Tibbets, and against J. H. Payne. It appears from the judgment that a portion of the judgment was recovered upon a note bearing ten *per cent* interest, and accordingly there is a recovery of $682.13, to bear interest from the date of judgment at the rate of ten *per cent per annum*, and the sum of $35.80, to bear interest at eight *per cent*. There was also a judgment for costs; the judgment was dated January 17, 1882.

The abstract admitted in evidence was dated February 6, 1882, and correctly describes the judgment, except the description of the parties is given only by the style of the case, thus, "Deere, Mansur & Company, plaintiffs, vs. J. H. Payne, defendants."

This abstract was objected to on two grounds: First, that it did not give correctly the names of the parties plaintiffs in the judgment; and second, that it did not show the amount still due on the judgment.

The abstract states that all the "judgment and costs is yet due and unpaid." The amount of the costs is not stated. But whether this is required or not has not been decided, nor has it been definitely held, that what is due upon the judgment may not be stated as it is stated in this abstract. I, therefore, submit this objection without further remark.

But the other objection ought to have been sustained. The names of the parties to the judgment, the statute in terms requires to be stated in the abstract. It is the abstract which is to be indexed, and in requiring the names of each plaintiff and each defendant to be indexed, what is required in the abstract is made definite.

The index was also objected to on the ground that the name of each plaintiff was not given. This objection would no doubt have been sustained by the court below, if the cases of Gullett Gin Co. vs Oliver & Griggs, and of Pierce vs. Wimberly had then been decided. The rule of construction necessarily leading to these decisions had been established in the other cases cited, but these direct decisions had not been made.

It is not the case in which the judgment has been rendered, that is to be abstracted, but the judgment itself. In the abstract the style of the case is not required to be stated, but the names of the parties—the names of the parties to the judgment.

Neither in the caption of the judgment nor in the judgment entry itself is there any reference to the plaintiffs as a firm or to their firm name. The individual plaintiffs are named both in the caption and the judgment, and they are named as individuals and not as partners.

In the firm name given in the abstract and in the index, the surnames of two of the plaintiffs do not appear—Velie and Tibbetts. They were plaintiffs, and they are not named in the abstract or index. They are no better identified by the word "Company" than they would have been if they had been designated as et al.

The firm name may be used in citations, as in Putnam vs. Wheeler, 65 Tex., 522, and the statute, which requires that the names of the parties shall be entered on the docket may be satisfied by a partnership name. Such considerations were urged by counsel for appellant

in Gullett Gin Co. vs. Oliver & Griggs, 78 Tex., 182, and the authorities used by counsel for plaintiff below were cited in the appellant's brief in that case at page 182 of the report, but the court construed the statute requiring the names of each plaintiff and of each defendant to appear in the index in alphabetical order as mandatory.

There was no such thing as a judgment lien on land at common law. The lien arising from the issue of an *elegit* was the creature of early English statutes.

Black on Judgments, sections 397, 398.
Freeman on Judgments, section 339.

These statutes were perhaps old enough to form a part of the common law as adopted by the Republic of Texas in 1840. Paschal's Dig. of the Laws of Texas, Art. 978. But before the common law was adopted the congress of the Republic had already passed a judgment lien law. Pas. Dig., Art. 3953.

It thus came to pass that the *elegit* and its *quasi* lien, which could not be foreclosed by sale, were never known in the jurisprudence of Texas.

We have never had such a thing as a judgment lien on land in Texas, except by virtue of express statutes.

The state law of 1879 having been adopted by the rules of court, the abstract of the judgment against Payne had to be recorded and indexed in accordance with that law to originate the lien.

It is submitted that the abstract and index admitted in evidence were not in accordance with the requirements of the act of 1879, and should have been excluded.

It may be urged, however, that as all the defendants' evidence was excluded, the proof made by the plaintiff, entitled the plaintiff to the judgment rendered, whether there was any lien or not. To this there are several answers.

First. If the lien was not essential, no controversy over the lien arising under the laws of the United States could confer jurisdiction.

Second. The plaintiff alleges that whether there was a lien or not is "the main and vital and controlling question in the case, and plaintiff's title entirely depends on the correct decision of said question.

And third. The plaintiff alleges that Payne was the common source of plaintiff's and defendants' title—and by allegations of fact, shows that defendants' title is prior and superior to plaintiff's unless there was a lien, and alleges that by "reason of such lien, plaintiff has the superior title to said property."

The rule in Texas is, that the plaintiff may obviate the necessity of deraigning title from the sovereignty of the soil, by proving a common source, but to recover, he must show that his title is superior to that of the defendant deraigned from the common source. "In action of trespass to try title in which he (the plaintiff) claims under a sheriff's deed, he does not make a *prima facie* case, merely by introducing his judgment, execution and deed, and by proving that his adversary claims under the defendant in execution, without showing that the latter's title is inferior to his own." Sebastian vs. Martin Brown Co., 75 Tex., 293.

Without the averment of the lien, the plaintiff's petition, undertaking to set out the title, would have been

demurrable, because the petition would have shown a superior title in the defendant. McDonald vs. Bank, 74 Tex., 539.

The ruling of the circuit court admitting in evidence the abstract and index was a material error, and requires a reversal of the judgment, and if this court sustains the second assignment of error, those following in this brief need not be considered.

IV.

The fourth and fifth assignments of error are both based upon the exclusion of the deed from J. H. Payne to Y. D. Harrington, either as evidence of outstanding title, or to show that the legal title to the land in contro versy was not before the court.

This deed bore date October 16, 1880, which was before the rendition of the judgment against Payne, under which plaintiff claimed, and therefore, before there could have been any judgment lien. The deed was a general deed of assignment for the benefit of creditors under the laws of Texas then in force, and was made by Payne to Y. D. Harrington, conveying all Payne's property in general terms, except that exempt from execution, it provided for the sale of the property, and the distribution of the proceeds among creditors, and the payment to the grantor of any surplus.

The first and second objections to the admission of the deed were in substance the same, namely: that both parties claiming from a common source, the defendants could not plead or prove an outstanding title.

It is sometimes said that a defendant deraigning title from a certain grantor is estopped from denying

that the grantor was the owner of the land. But this is true only when some obligation to respect that title is imposed by recital or covenant. Accepting an ordinary conveyance in fee imposes no such obligation. Robertson vs. Pickrell, 109 U. S., 608-616.

There was nothing shown in the deed made by Payne to Cooke to prevent the latter from asserting that Payne was not the owner of the land at the date when plaintiff claimed that the judgment lien attached.

In some jurisdictions the rule may prevail, that when common source is proved, neither party can show an outstanding title back of that source, but in Texas there is no estoppel in such cases. "The question is one of the burden of proof only." Howard vs. Masterson, 77 Tex., 41.

When the plaintiff proved that Payne was the common source, if he then proved that his title from that source was superior to that of the defendants', derived from the same source, he made a *prima facie* case, which defendants could rebut by showing an outstand-standing title from the same source superior to the plaintiff's.

The third objection was that the outstanding title was barred by limitation of five years. To this objection there are several answers. In the first place, to have any benefit of limitations, the plaintiff as well as a defendant must plead the statute. Mayer vs. Paxton, 78 Tex., 196.

Second. The five years statute of limitation does not run in favor of a grantor, who remains in possession after conveying the land. This is well settled in Texas

and conclusive of this objection. Voight vs. Mackle, 71 Texas, 78.

And third. If limitation through possession of Payne and of Cooke under Payne, divested Harrington of his title, it was vested by the same facts in Cooke, and would thus have defeated the plaintiff's suit.

The fourth objection to the deed was that the title conveyed by it to Harrington had reverted to Payne. It was proved that Payne had never surrendered the land to Harrington, that Harrington had never demanded possession, and had administered his trust without disposing of the land prior to July 1, 1881, and had made his final report to the proper court and been discharged, and had ceased to act as trustee. I admit that in a court administering both law and equity, these facts would prevent the plaintiff's title from being defeated by Harrington's outstanding legal title. In such a court the outstanding title must be subsisting and operative. But in the circuit court the plaintiff, to recover, must have the legal title. The purchaser at execution sale, to maintain his suit, must show that the defendant in execution had the legal title. Smith vs. McCann, 24 Howard, 398.

The deed from Payne to Harrington vested in the latter the legal title. There was no condition on which the deed was to become void or the title revert. After the conveyance to Harrington, Payne remained the beneficial owner subject to the trust—he could have discharged the trust and required a reconveyance, but the failure of Harrington to execute the trust as to this land did not restore to Payne the legal title. Equitable inter-

ests or estates in land may be shifted by such matters *in pais*, but the legal title may pass only by deed or statute.

If the deed to Harrington had been admitted it would have shown that the legal title was not before the court and that a court of law had no jurisdiction. It would also have shown that the plaintiff did not have the legal title, the only title upon which he could recover in the forum of his deceitful seeking.

The fifth and last objection was on the ground that the deed offered was not the deed pleaded by defendants. There was no misdescription—no variance. This objection is simply on the ground that the defendants in the plea, did not conform to the plaintiffs' taste in the particularity of the description of the conveyance.

We think the objections ought have been overruled, and I submit that the fourth and fifth assignment of error should be sustained.

V.

The defendants next offered in evidence the deed from J. H. Payne and wife to J. H. Cooke, dated January 2, 1886, to prove their title to the land, and the plaintiff objected on the ground that defendants having specially pleaded an outstanding title, could prove no other defence. This objection was sustained, and this ruling is the subject of the 6th assignment of error. As the court had already held that the judgment against Payne was a lien antedating the deed to Cooke, the admission of the deed would not have affected the result of the trial below. The error in excluding the deed would therefore be immaterial but for a view of the case

which might possibly be taken. If it should be held that there was no judgment lien, but that nevertheless the court below had jurisdiction, and that notwithstanding plaintiff had alleged the lien to be the basis of his title he need prove no lien, and that notwithstanding plaintiff had pleaded defendants' title, it was still necessary for defendants to make proof of said title; then, if the deed from Payne and wife to Cooke was properly excluded, it would appear that plaintiff was entitled to judgment. We feel the utmost confidence that this view of the case borders upon legal absurdity and cannot be taken and that it will not be urged by counsel for defendant in error; but the consciousness that we are not infallible persuades us to devote some little space and labor to the support of this assignment of error.

The deed was objected to only as evidence of title in defendants, and on the ground only, that proof of title in defendants was precluded by the plea of outstanding title. The action of trespass to try title in Texas is statutory. (R. S. Texas, Arts. 4784 to 4821.) The plaintiff may prove his title under a general allegation of ownership, (except when he claims by limitation, Mayer vs. Paxton, 78 Texas, 196) and defendant may prove any defense except limitation, under the plea of not guilty. If the defendant in the statutory action pleads not guilty and specially pleads another defense, he thereby waives the general issue and is confined to the defense specially pleaded. (R. R. Co. vs. Whitaker, 68 Tex., 630 and cases cited.) This rule is the one acted upon in sustaining objections to defendants' deed. The rule has no application when the plaintiff pleads his

title as the plaintiff did in this case. This suit, then, is not the statutory action, and the rules of pleading applicable to other cases govern. We believe no case will be found in Texas in conflict with this statement of the law. The general rule of pleading is, as provided by statute, that the defendant may plead as many inconsistent defenses as he pleases, and no plea, general or special, waives any other. (R. S. Texas, Art. 1262.) But if this view is incorrect, and the plea of outstanding title did waive the plea of not guilty, still the deed offered was admissible in evidence. The plaintiff in his second amended original petition, the one on which the case was tried, pleaded that defendants claimed title to the land in controversy under this very deed,(printed Record, p. 9) he therefore was in no position to object to its admissibility as proof of title, on the ground that no pleading of defendants supported its admission. The plaintiff's own pleading justified its introduction; he himself having pleaded it, could not object to the defendants proving the truth of his own allegations, if, indeed, under the state of the pleadings in this case, it was necessary for the defendants to make such proof. If the objection made, had been not to the admissibility of the deed to show title, but that plaintiff having pleaded and thereby admitted the deed, its introduction was unnecessary, the objection would, we think, have been well taken. Under the plaintiff's pleading, we submit that it was not necessary to make proof of this deed at all. The effect of plaintiff's pleading in his petition on which the case was tried, (Record pp. 9, 10 and 11) is that Payne was the common source of title, that de-

fendants claim title under a deed directly from said Payne and wife to them, but that the title so conveyed was defeated by sale made under a judgment against the common source, which judgment was a lien on the land conveyed prior to the date of the conveyance, and that plaintiff claimed title under this judgment sale. The existence of this prior judgment lien is the only reason alleged why the defendants did not by their deed from the common source acquire good title. In fact, plaintiff expressly alleges, after setting out the claim of title of both plaintiff and defendants, that plaintiff's title depended upon the validity of the said judgment lien. It was in effect an allegation that the defendants had title unless the title set up by plaintiffs was a superior one. We submit, therefore, that the introduction of this deed to show title in defendants was unnecessary, but that the same was admissible under plaintiff's pleading Hill vs. Allison, 51 Texas, p. 390.

VI.

Under the plea of permanent and valuable improvements in good faith, the defendants, Cooke and wife, offered in evidence the deed from Payne and wife to J. H. Cooke, to which the plaintiff objected, on the ground, among others, that suit having been commenced on December 24th, 1886, and the deed being dated January 2nd, 1886, defendant could not have held adverse possession of said land in good faith under a claim of title for more than twelve months before the commencement of the suit. This objection the court sustained, not ruling on any other, and excluding said deed. Defendant then offered to prove in connection with said deed, that in Oc-

tober, 1885, more than twelve months before the commencement of the suit, defendant, J. H. Cooke and said J. H. Payne had verbally agreed upon the terms of the trade afterwards carried out by said deed, but no consideration was paid said Payne until the date of the deed, and that immediately upon the making of said verbal agreement said Payne delivered and said defendant Cooke took exclusive posession of the property in controversy, holding adversely and in good faith and commenced the erection of improvements upon said land as his own, and erected upon same in good faith, and before he knew of any judgment lien, improvements to the value of $10,000, and by that amount enhanced the value of the property. Upon motion of the plaintiff the court excluded said testimony on the ground that under the law said parol contract furnished no basis for a claim for improvements. (Record, p. 21). These rulings are the subject of the seventh assignment of error.

The defendant in trespass to try title may set up in his pleadings that he and those under whom he claims "have had adverse possession in good faith of the premises in controversy, for at least one year next before the commencement of such suit," and that he has made permanent and valuable improvements, etc. (R. S. Texas, Art. 4813.) The objection made and sustained to the deed and evidence offered in connection with it, was that it did not show adverse possession in good faith, for as much as one year before the commencement of the suit.

"Good faith entitles the possessor of land which he has improved, to great favor." (10 Am. & Eng. Ency-

clopedia of Law, p. 244.) Though the contract under which defendant entered, was in parol, his possession and making valuable improvements upon the faith of it, entitled him to demand specific performance. (Waterman on Specific Performance of Contracts, Secs. 280–1.) The requisites of the statute are that the possession must be adverse and in good faith. That it was adverse in the sense that the defendant claimed to be the owner as against the world, there was no question. The fact that he recognized his obligation to pay Payne, the vendor, the price agreed upon, and did not hold adversely to this demand, can surely cut no figure in the case; if it does, then there can be no such thing as improvements in good faith under a deed reserving a lien for the purchase money. That the improvements were made in actual good faith cannot be disputed, for no one will assume that defendants intended to improve at such cost to themselves, the lands of another; but the point relied upon seems to be that because a parol sale of land is not enforceable under the statute of frauds, that defendants could not have believed that under their parol contract with Payne they had the title. But if they had the possession and had made improvements and were entitled to a specific performance, they in equity, had as good title as if they had a deed. The statute does not require a claim to be made under a deed, but it requires it to be in good faith. If the claim is made under an equitable title which entitles the possessor to call for the legal title, it is made in as much good faith as if made under the legal title. The question in such a case is not whether the title is written or unwritten,

but whether the possessor, knowing the law, could in good faith expect to retain and hold the property under the claim by him asserted. It may be replied by plaintiffs that this land was the homestead of Payne, and therefore Cooke's possession and improvements would not have entitled him to specific performance, because a homestead under the laws of Texas can only be conveyed by deed in which the wife joins. The reply to this is that if it was homestead, the judgment against Payne, under which plainiiff claims, could not have been a lien upon it, and plaintiff has acquired no title under the sale under such judgment. It seems to us that when the nominal plaintiff in this case is a purchaser without consideration, and that the real plaintiffs, Cobb and Avery, have purchased for the puny sum of two hundred dollars, the land which the defendant has honestly and in good faith bought and paid for, and has in addition enhanced in value ten thousand dollars by the expenditure of that much of his own money upon it, believing it his, and when after Payne and wife have carried their parol agreement into execution, that a court would not look with much favor upon the plaintiff's plea of the statute of frauds.

VII.

The defendants, J. H. and M. E. Cooke, offered to prove that from January 1st, 1882, until the sale to defendant Cooke, that the said J. H. Payne was the head of a family consisting of wife and children, and that the land in controversy during said period was his homestead, and was not subject to the judgment lien, execution, levy and sale through which plaintiff claimed; but

the court, on motion of plaintiff excluded said evidence on the ground that defendants having pleaded an outstanding title could not rely upon other defenses,and this ruling is the error complained of in the eight assignment of error. (Record pp. 21 and 29).

The plaintiff in his petition had set out that defendants claimed title from the common source by a deed dated January 2nd, 1886, and that plaintiff claimed title through a judgment against the common source dated January 17th, 1882, and duly recorded and indexed February 9th, 1882. That said judgment was a lien on the property in controversy from its date and from the date of the recording and indexing of the abstract of judgment, and therefore that the sale made under said judgment carried the superior title. He alleged expressly that his title depended upon the validity of the lien on said property, and averred that the same was a valid and binding lien on said property at the date of said sale by said marshal. The legal effect of plaintiff's pleading was that the defendants had title to the property in controversy, unless the judgment under which plaintiff claimed was a lien upon said property.

The constitution of Texas of 1876, and still in force, article 16, section 50, exempts the homestead of a family from forced sale, except for the payment of purchase money and taxes due thereon, and for work and material used in constructing improvements thereon, and declares that "no mortgage, trust deed or other lien on the homestead shall ever be valid, except for the purchase money thereof or improvements made thereon as hereinbefore provided, whether such mortgage or trust deed or

other lien shall have been created by the husband alone or together with his wife, and all pretended sales of the homestead involving any condition of defeasance shall be void." So that in Texas a homestead is not subject to be taken in execution for debt and a judgment creates no lien thereon. We think, therefore, that when plaintiff sought to defeat defendant's title by setting up a prior judgment lien, he assumed the burden of showing not only that the judgment had been so dealt with as to make it a lien on property subject to such lien, but that the particular property in question was subject to such a lien. Under plaintiff's pleading the burden was on him to prove all the facts necessary to be proven to show the existence of the lien in question. To prove a valid judgment against the owner and its proper abstracting and recording and indexing was not sufficient, until something more was shown no lien upon the property in question was shown, for if the property was homestead, then the judgment, abstract, record and index created no lien. It was necessary to go further and show that the property was not homestead, and therefore subject to the lien.

Plaintiff having set out defendant's title and undertaken to avoid the effect of it assumes the burden of proof on the issue thus made by him, and must show all facts necessary to avoid it. Hill vs. Allison, 51 Texas, 390.

We think, therefore, that it was not necessary for the defendants to show that the land in question was the homestead of Payne, but that the burden of showing that it was not was upon the plaintiff, because until he showed this he showed no lien.

But if the foregoing views are incorrect and the burden was upon defendants, the evidence was admissible; 1st, under defendant's plea that the land in question was the homestead of Payne. (Record, p. 8). If the plea of outstanding title waived the plea of not guilty it did not waive any other special plea in the case. One special plea is not waived by another special plea. 2nd, under the plea of not guilty, which, for reasons already given, we contend was not waived in this case by the special pleas. 3rd, in rebuttal of plaintiff's case. All the authorities in this State hold that even when the plea of not guilty is waived by a special plea, it still has the effect of a general denial, requiring the plaintiff to prove his case as pleaded, and permitting the defendant to introduce any evidence in rebuttal of the case made by plaintiff. Koenigheim vs. Miles, et al., 67 Texas, pp. 113 and 117. Plaintiff having alleged that the judgment in question was a valid and binding lien upon the property in controversy, the plea of not guilty even if waived stood as a general denial, and in addition thereto there was a plea of general denial in defendants' first supplemental answer, and under this general denial defendant could show any facts which negatived plaintiff's allegation. To support this allegation of lien the plaintiff introduced in evidence said judgment and abstract thereof recorded and indexed. Defendants then had the right under the pleadings to show that notwithstanding such judgment and abstract thereof and record and index, said judgment was not a lien upon the property in controversy, and to have shown that it was Payne's homestead as defendant offered to do, would most effectually have shown this.

The evidence was purely in rebuttal and should have been admitted, and its exclusion was material error.

The 9th assignment of error includes the foregoing errors discussed, and need not here be further dwelt upon.

VIII.

The 10th assignment of error is, that "the court erred in directing any verdict or rendering judgment agaist defendant M. E. Cooke for damages, the proof showing no liability upon her part." The record shows M. E. Cooke to be the wife of defendant J. H. Cooke. On what theory the judgment was rendered against her for damages, the record wholly fails to disclose. There is no evidence which even tends to show liability upon her part. The basis of the judgment seems to be that she is her husband's wife. Such a judgment, is under the facts in this case erroneous.

IX.

The verdict rendered in this case is as follows:

"We, the jury find for the plaintiff title to the land in controversy, and damages in the sum of two thousand six hundred and thirty-eight and 12 1-2 100 dollars. ($2638.12 1-2.)"

Upon this verdict the court entered judgment for damages against J. H. and M. E. Cooke only. That this judgment does not conform to the plea, proof and verdict, is the 11th and last error assigned.

The petition was against all the defendants without distinction. The court instructed the jury to find for

plaintiff the lands in controversy and damages, without distinction as to defendants, and the jury so found; but upon this general verdict the court entered judgment against J. H. and M. E. Cooke only. This we think was error, but as it is more technical than substantial, we will not further elaborate it.

We respectfully submit, that for the foregoing errors, the judgment of the circuit court should be reversed, and so we pray.

~~M. L. CRAWFORD,~~
~~Counsel for J. H. and M. E. Cooke, Plaintiffs in Error.~~

M. L. Crawford
Counsel for J. H. & M. E. Cooke
Plffs in Error.

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In the Supreme Court of the United States,

OCTOBER TERM, 1892.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Brief and Argument of Defendant in Error.

JOHN M. AVERY,
Attorney for Defendant in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

Brief and Argument of Defendant in Error.

The statement of the case is given in brief of plaintiffs in error. The first assignment of error is also copied in their brief, together with the pleadings and the action of the court on the demurrers. (Record pp. 8, 22 and 28). We submit the following propositions, arguments and authorities under this assignment.

Propositions under First Assignment of Error.

1st. When the allegations of plaintiff's petition show that he derives his title through the lien of a judgment of a federal court and the rules of a federal court and that by one construction of the laws of the United States and the rules of said court, for which he contends, said lien is valid and his title is good and that by another construction of said laws and rules, for which defendants contend, said lien is invalid and his title bad, then such petition presents a federal question arising

under the laws of the United States and the United States circuit court has jurisdiction irrespective of the citizenship of the parties.

2nd. A plea to the jurisdiction which fails to deny the jurisdictional facts alleged in the petition is bad. And such plea should be presented promptly.

Authorities on First Proposition above:

Act of March 3, 1875, Section 1.
U. S. Revised Statutes, Sections 721 and 916.
Rule 1 of U. S. Circuit Court Northern District of Texas, adopted at Dallas April 2, 1880. (Record, p. 17.)
Rule 1, U. S. Circuit Court Northern District of Texas, adopted at Dallas, July 26, 1881. (Record, p. 17.)
Clements vs. Berry, 11 Howard, 398, (U. S.)
Massingill vs. Downs, 7 Howard, 760, (U. S.)
Dupasseur vs. Rochereau, 21 Wallace, 130, (U. S.)
Erwin vs. Lowry, 7 Howard, 172, (U. S.)
Starin vs. New York, 115 U. S., 257, (U. S.)
San Mateo County vs. Southern Pacific R. R. Co., 7 Sawyer, 517.
Osborn vs. Bank of U. S., 9 Wheat, 822, (U. S.)
U. P. R. R. Co. vs. Myers, 115 U. S., 1-25.
Eaton vs. Calhoun, 2 Flippin, 593.
Ames vs. Kansas, 111 U. S., 449.
Sawyer vs. Parish of Concordia, 12 Federal Reporter, 754.
Branch vs. Lowery, 31 Texas, 97.
Holt on Concurrent Jurisdiction, Sec. 83.

Authorities on Second Proposition above:

Deputron vs. Young, 134 U. S., 241.

ARGUMENT ON FIRST ASSIGNMENT OF ERROR.

This case was brought on December 24th, 1886, and as to jurisdiction is governed by the act of March 3, 1875, section 1, contained in chapter 137, supplement to the Revised Statutes of the U. S. (The act of 1887 is the same on this point.) That section provides that the United States Circuit Court shall have original jurisdiction "of all suits of a civil nature at common law or in equity, * * * arising under the constitution or laws of the United States." The first question is as to what is meant by a "suit arising under the laws of the United States?" In San Mateo County vs. Southern Pacific R.R. Co., 7 Sawyer, 517, Mr. Justice Field says: "A case is said to arise under the constitution and laws of the United States whenever its decision depended upon the correct construction of either, or when the title or right set up by a party might be defeated by one construction or sustained by the opposite construction." And this is the definition of these words given by Chief Justice Marshall in Osborn vs. Bank of United States, 9 Wheat., 922, and in Cohens vs. Virginia, 6 Wheat, 379, and it has been followed in all subsequent decisions. See Starin vs. New York, 115 U. S., 257, (U. S.)

In order to see how the allegations of the petition bring this case within the above definition it will be necessary to consider the laws of the United States; the rules of the United States circuit court for the northern

district of Texas; the laws of Texas relating to judgment liens, and the decisions on those laws. Section 721, U. S. Revised Statutes provides: "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Section 916, U. S. Revised Statutes provides: "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held or by such laws hereinafter enacted which may be adopted by general rules of such circuit or district court, and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Rule 1 of the United States circuit court of northern district of Texas, adopted April 2nd, 1880, is as follows: "The modes of proceedings prescribed by the laws of Texas where they do not conflict with the laws of the United States or a rule of the supreme court of the United States or of this court are adopted." (R. p. 17).

Rule 1 of said court, adopted July 26, 1881, is as follows: "All laws and rules of procedure and practice prescribed by the legislature of Texas as they now exist, or as they may be changed and amended from time

to time * * * * are hereby adopted as the rule of practice in this court." (R. p. 17).

The above two sections are held to be the ones which give a lien to a judgment rendered in the United States courts, but the decisions leave it uncertain as to which one of them confers the lien. Freeman on judgments, sec. 404; Ward vs. Chamberlain, 2 Black 430 (U. S.); Massingill vs. Downs, 7 Howard, 760 (U. S). Prior to the act of congress of August 1st, 1888, there was no law of the United States expressly making a judgment in a United States court a lien or regulating how such a lien should be fixed, but the United States courts by a construction of these sections held that such a lien existed. So that the question whether or not any lien at all could exist on the judgment under which plaintiff claimed depended on the proper construction of the above sections and rules of court, and this in itself alone presented a federal question.

The above sections were operative on December 1, 1873 (United States Revised Statutes, title 74). At that date the laws of Texas relating to judgment liens were contained in Paschal's Digest of laws of Texas, article 7005, being the first section of the act of November 9, 1866. By the decisions of the supreme court of Texas it was decided that under this law a judgment ceased to be a lien unless execution issued on it each year after its rendition. (Bassett vs. Proetzel, 53 Tex., 569. Barrow vs. Thompson, 54 Tex., 235).

The allegations of plaintiff's petition showed that the judgment under which he claimed a lien was rendered on January 17, 1882, and that one execution issued

thereon on March 3, 1882 and another on August 11, 1886, but did not state that execution had issued each year (R. p. 9 and 10). The defendants contended that, by a proper construction of sections 721 and 916 of United States Revised Statutes and the above rules of court, the lien of this judgment depended on the laws of Texas as they existed on December 1, 1873 and that consequently the judgment had lost its lien by the failure to issue execution on it each year. By this construction plaintiff would have no title. (R. p. 18).

By the Revised Statutes of Texas passed in 1879, important changes were made in the laws of Texas relating to judgment liens, especially as to issuing executions on the judgment each year and the duration of the lien. Revised Statutes of Texas, articles 3154, 3155, 3157, 3158 and 3159 provide that an abstract of the judgment shall be recorded and indexed in the county where the land lies and the judgment shall then become a lien. Art. 3160 is as follows: "When a lien has been acquired, as provided in this chapter, it shall continue for ten years from the date of such record and index, unless the plaintiff shall fail to have execution issued upon his judgment within twelve months after the rendition thereof, in which case said lien shall cease to exist." Plaintiff alleged that an abstract of the judgment under which he claimed a lien had been duly recorded and indexed in Hunt county where the land lay and that an execution had issued on the judgment within twelve months from its rendition. He contended that by the proper construction of said articles 721 and 916, United States Revised Statutes, and said rules of court the laws of Texas of

1879 governed this lien and that the lien continued for ten years from the date of recording and indexing the abstract, without further issuance of execution.

By this construction the lien would be valid and his title good. (R. p. 18).

This land lay within the jurisdiction of the United States Circuit Court for Northern District of Texas, and the allegations of the petition show that plaintiff also claimed that the judgment under which he held was a lien on all the land of defendant, J. H. Payne, within the jurisdiction of the court from the date of its rendition without any abstract of it being recorded and indexed in the office of a state officer. Some of the courts of the United States have so construed the United States laws. (United States vs. Humphrey, 3 Hughes, 201; Carroll vs. Watkins, 1 Abbott, 474; Shrew vs. Jones, 2 McLean, 78; Freeman on Judgments, sections 339, 403, 404 and 405, 4th edition.)

Defendant denied that this was the law.

First. It will thus be seen that the question whether a United States judgment could be a lien in any event depended on the proper construction of the laws of the United States and the rules of court. These laws and rules do not mention judgment liens by name and it is only by construction that they exist.

Second. It is only by the proper construction of these laws and rules that it can be decided whether the laws of Texas of 1873 govern this lien or the laws of Texas of 1879. If the construction contended for by defendants is proper, the lien was lost and plaintiff had no title;

if the construction contended for by plaintiff was proper, then the lien was valid and his title was good.

Third. Whether or not the judgment was a lien from its rendition without an abstract of it being recorded and indexed by a state officer over whom the United States Courts had no control, was a question depending on the proper construction of said laws and rules. If this question was decided in the affirmative the lien was valid and plaintiff's title good without any abstract of the judgment being recorded and indexed.

Most of the cases in which this question has arisen were appeals from the Supreme Courts of the states or removal cases, but they are applicable to the act of March 3rd, 1875, as practically the same language is used in each instance.

In Clements vs. Berry, 11 Howard, 398 (U. S.), this court says: "The jurisdiction of this court is the first question to be considered. The plaintiff sets up a lien on certain personal property under a judgment rendered by the Circuit Court of the United States, held for the middle district of Tennessee. The defendant asserts a lien under a deed of trust for the property, from Charles F. Berry, and the Supreme Court of Tennessee held that the lien of the deed was paramount to that of the judgment. This brings the case within the twenty fifth section, as the decision was against the right asserted by Clements, under the authority of the United States."

In Dupasseur vs. Rochereau, 21 Wallace, 130, this court says: "Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the

case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States and the decision is against the title or right so set up. It would thus be a *case arising under the laws of the United States* establishing the circuit court and vesting it with jurisdiction, and hence it would be within the judicial power of the United States, as defined by the constitution."

In Massingill vs. Downs, 7 Howard 760 (U. S.) the action was brought in the United States Circuit Court for the Southern District of Mississippi, to try the title of certain property. Plaintiff claimed title under the lien of a judgment of that court and an execution, etc., on it. Defendants claimed title under a mortgage by the owner. This court says: "The plaintiff's in the above judgment acquired a right under the authority of the United States and that right may be protected from any judgment of the supreme court of the state which will impair it, under the twenty-fifth section of the judiciary act."

The case of Erwin vs. Lowry, 7 Howard, 172 (U. S.) is to the same effect. In Branch vs. Lowery, 31 Tex., 97, the question decided was that the lien of a judgment of a United States court was not confined to the lands of the defendant situated in the county where the judgment was rendered, but that it extended to any of his lands in the district over which the court had jurisdiction, although no transcript of the judgment had been recorded in the county where the land lay as required by

state laws. In the opinion the court says: "The courts of the United States are made the final arbiters of such a question as the interpretation of the force and effect of its own laws by the Constitution of the United States. * * * The matter to be considered here involves the *construction of the statutes of the United States*, submitting to the laws of the several states as rules of decision in cases where they apply. * * * While those courts have uniformally said that they will receive as authoritative the construction which state courts give their own statutes, wherever any statute of the United States comes under revision, the courts of the United States, by the constitution, are made the ultimate arbiters of its force and effect."

It thus clearly appears that by the proper construction of the laws of the United States and said rules of court contended for by defendants, plaintiff's lien was invalid and his title bad and, that by the construction of said laws and rules contended for by plaintiff, said lien was valid and his title good. His title thus depended on the proper construction of those laws and rules and the correct decision of this question. The validity of the judgmeut lien rests alone on the above laws of the United States. If said laws confer the lien, then the title is valid; if not, it is invalid. These laws are the first ingredient in the case, are its origin, are that from which every other part arises. The title set up by plaintiff will be defeated by one construction of these laws and sustained by the opposite construction. (Ames vs. Kansas, 111 U. S., 449.) This brings this case within the above definition of a case "arising under the laws

of the United States" and the above decisions. Hence the ruling of the circuit court on the demurrers was proper and this assignment of error is not well taken.

We do not think that the case of Carson vs. Durham 121 U. S., 421 applies to the case at bar. In the opinion it is said, "it is an attempt to enforce an ordinary property right acquired under the authority of judgments and decrees in the courts of the United States without presenting any question, distinctively involving the laws of the United States." As we have attempted to show above plaintiffs' case does distinctly involve the laws of the United States. If plaintiffs' title depended simply on the United States court judgment, without any question of lien being involved, and an execution and sale under it, then no construction of the United States laws would be involved and Carson vs. Durham might apply; but his title depends on the lien of said judgment and in order to ascertain the existence of that lien and its extent and duration and the steps necessary to fix and secure it, a distinct construction of the laws of the United States is necessarily involved and by one construction of them the title is good, and by another the title is bad. We also call attention to the fact that under the practice in Texas, if the allegations of the petition are not as particular, full and definite as they should be, this defect can only be reached by a special demurrer and not by a general demurrer. In this case defendants only filed a general demurrer to this part of the petition and we submit that the allegations of the petition on this point were sufficient when tested by a general demurrer. We also submit that a rule of court, in pursuance of law, be.

comes, to all intents and purposes, of the same effect as the law itself and a title depending on a construction of the rule is in effect depending on a construction of the law. (Seymour vs. Phillips & Colby Co., 7 Bissell, 460).

We submit that the cases cited by us are authority in this case although some of them were appeals from the supreme courts of the states. The constitution of the United States provides that the "judicial power shall extend to all cases in law and equity arising under the constitution and laws of the United States." The authority in congress to provide for appeals from state courts and to confer jurisdiction on circuit courts is in both instances, derived from this provision of the constitution. The act of March 3, 1875, is in the language of the constitution and confers jurisdiction on the circuit court "in all cases arising under the constitution and laws of the United States." Article 709, United States Revised Statutes, allows appeals from state courts where a title, right, etc., is claimed under such laws or authority exercised under the United States and the decision is against the same. If such right, title or authority does not constitute "a case arising under the constitution and laws of the United States," then article 709 must be unconstitutional, because it is only to such cases that the judicial power of the United States extends. If, however, such title, right or authority does constitute "a case arising, etc.," within the meaning of those words in the constitution, then the same right, title or authority would constitute "a case arising, &c." within the meaning of those terms in the act of 1875, as identically

the same words are used in this act and in the constitution. From this we submit that any case which could be appealed from the state court under article 709 could also be brought in the circuit court under the act of 1875. Suppose an action was brought in the circuit court in which the title claimed depended on an authority exercised under the United States and this court should hold that it was not a "case arising, etc.," within the meaning of those words in act of March 3, 1875. Suppose that the action was then brought in the state court on the same title and the highest state court should decide against such title, then this court would hold that it had jurisdiction on appeal under article 709. In order to so hold, this court would necessarily hold that it was "a case arising, etc.," within the meaning of those words in the constitution which is the source of all judicial power of both this court and the circuit court. Hence we would have the same title presenting both "a case arising, etc.," and not "a case arising, etc." We submit that the words, "a case arising, etc.," both in the constitution and in the act of 1875 include the title, right or authority mentioned in article 709. Congress could have conferred upon this court jurisdiction on appeal from the state courts of all cases arising under the laws of the United States, but it did not do this and limits the jurisdiction on appeal to certain specified cases. But it did confer upon the circuit court jurisdiction of all such cases to the full extent allowed by the constitution. If it is held that certain of these cases can be appealed from the state courts, but can not be brought in the circuit court, then we will have the curious anom-

aly of the whole not including a part. These views are supported by the cases of Eaton vs. Calhoun, 2 Flippen, 593; Sawyer vs. Parish of Concordia, 12 Federal Reporter, 754.

OBJECTION.

Defendant in error objects to the consideration by this court of any of the other assignments of error for the following reasons, viz.:

All the other assignments of error are based on eight purported bills of exceptions and cannot be considered without them. (R., pp. 28, 29.) The printed record (pp. 1 and 22,) shows that this case was tried before and the judgment rendered by the Circuit Court held by Hon. L. Q. C. Lamar, Circuit Justice, presiding, Hon. Don A. Pardee, Circuit Judge, and Hon. A. P. McCormick, District Judge. These bills of exception (R., pp. 13 to 22,) were approved and signed only by Hon. A. P. McCormick, District Judge. The record shows no reason why they were not approved and signed by the presiding judge, who tried the case with the district judge. And according to law they are void, and the assignments of error based on them should not be considered by this court.

Authorities:

U. S. Revised Statutes, section 953.
U. S. Revised Statutes, section 650.
U. S. Revised Statutes, section 614.
Mussina vs. Cavazos, 6 Wallace, 355.

Wagner vs. Zeigler, 44 Ohio St., 59.
Fechmeier vs. Traunsteine, 12 Colo., 282.

ARGUMENT ON OBJECTION.

From sections 650 and 6I4 United States Revised Statutes it is evident that the presiding justice or judge is to make the rulings on the trial, and section 953 requires him to approve and sign the bills of exception, and the district judge has no power to do so in such a case. And this is entirely proper. The presiding justice or judge who makes the rulings certainly must know better than any one else what those rulings are and his reasons for making them, and he is better able to certify by bill of exceptions as to the facts of his rulings. If any other practice is allowed, then the rulings will be made by one judge upon reasons which might be entirely satisfactory, but the bill of exceptions will be allowed and signed by another judge and may not present the facts as the presiding judge understood them. In this way this court would be reviewing the rulings of the presiding judge upon a state of facts different from the ones on which he made his rulings. The authorities above cited, while not exactly in point, sustain our views. See also our motion to strike out these bills of exceptions. But in case this court does not sustain this objection, we will take up these assignments of error and discuss them.

THIRD ASSIGNMENT OF ERROR.

The third assignment of erroris copied in brief of plaintiffs in error.

First Proposition Under Third Assignment of Error.

When the decision of a federal question is involved in the case and is once raised and relied on by defendant so as to give the federal court jurisdiction of the case, the defendant cannot defeat this jurisdiction by afterwards failing to rely on this question.

STATEMENT.

Bill of exception Number 2 shows: that on a former trial of this case in this United States circuit court the defendant's only contention was that by the proper construction of article 916, United States revised statutes and the rules of this court, the laws of Texas of 1873 governed the judgment lien under which plaintiff claimed title and that by those laws said lien was lost by the failure to have execution issued each year; and that plaintiff contended that by the proper construction of said article 916 and rules of court, the revised statutes of Texas, passed in 1879, governed said lien and under them the lien was not lost by failure to issue execution each year; and thereupon the court overruled said motion to dismiss. (R. p. 18). This is the same question presented under the first assignment of error and we refer to the statements, authorities and arguments presented by us under that assignment.

Authorities:

Osborn vs. U. S. Bank, 9 Wheaton, 738 (U. S.)

In the above case of Osborn vs. the United States bank, Chief Justice Marshall says: "A cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law. If it is a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. * * * *

"The question forms an original ingredient in every cause, whether it be in fact relied on or not, in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." This case has been followed in all subsequent decisions. And the reasoning is correct. Take this case: on the first trial defendant relied on the decision of a federal question to defeat this action. On the second trial he pretends not to rely on this question and asks that the case be dismissed for want of jurisdiction. Suppose the case had been dismissed and had then been brought in the state courts. There would be nothing to

prevent the defendant from again raising and relying on the federal question in the state court. Under the act of 1875 the plaintiffs would have a right to remove the case to the federal court. Defendant could then abandon his federal question and have it remanded to the state court and could then raise the question again. In this way the plaintiff would be either compelled to try the federal question in the state court or his case would be kept in a continual see-saw from the state to the federal court. We submit that this assignment is not well taken.

SECOND ASSIGNMENT OF ERROR.

The second assignment of error is copied in brief of plaintiffs in error and we submit the following propositions, arguments and authorities on it:

First Proposition under Second Assignment of Error.

The object of the Texas statute requiring abstracts of judgments to be recorded and indexed in order to create a lien, is not to encumber the registry with full information, but to excite inquiry and put intending purchasers on notice of such judgment and indicate the source of full information.

Second Proposition under Second Assignment of Error.

Where a rule of the United States Court adopts a State law in regard to judgment liens, a compliance with the State law makes a Federal judgment a lien.

STATEMENT.

The record shows that on January 17, 1882, John Deere, Chas. H. Deere, Stephen H. Velie, Alvah Mansur

and Louis B. Tibbits, who were partners under the firm name of Deere, Mansur & Co., recovered a judgment in the United States Circuit Court for the Northern District of Texas, at Dallas, against J. H. Payne for $717.93, of which $682.13 bore interest at 10 per cent. and $35 80 at 8 per cent.; this suit was brought by said firm on a promissory note payable to the firm; the suit was numbered 198 on the docket of said court and was styled Deere, Mansur & Co. vs. J. H. Payne, and all the papers and the citations, etc., were so numbered and styled; this judgment was entered on the minutes of the court in minute book 1, page 534, and the index to the judgments of this court showed that a judgment in favor of Deere, Mansur & Co. and against J. H. Payne was entered in this court on January 17th, 1882, in minute book 1, page 534; the judgment as written up was in the individual names of the parties and omitted to state that they were partners or to give the firm name.

The abstract of said judgment and the index thereof objected to was as follows:

"Circuit Court of the United States for the Northern District of Texas, at Dallas.

"I, A. J. Houston, clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas, do hereby certify that in said court on Tuesday, January 17th, 1882, the plaintiffs recovered a judgment against the defendant for the sum of $717.93, of which the sum of $682.13 shall draw interest from said date at ten per cent. per annum, the balance $35.80 shall draw interest at eight per cent. per annum, together with the costs by plaintiffs incurred; all of which judgment and

costs is yet due and unpaid by the defendant in case No. 198 and styled Deere, Mansur & Co., plaintiffs, vs. J. H. Payne, defendant; all of which appears from the records of said court now in my office.

"In testimony whereof I hereunto set my hand and affix the seal of said court, at Dallas, Texas, this 6th day of February, A. D. 1882, and of the independence of the United States the 106th year.

"A. J. HOUSTON,
"Clerk of said Court."

[Seal of Court.]

"Filed for record Feb'y 9th, 1882, at 10 o'clock a. m.; recorded same day and hour.

"A. CAMERON,
"Co. Clerk, Hunt Co., Texas."

The certificate of the county clerk of Hunt County showed that this abstract was recorded in judgment record book No. 1, page 47, of Hunt county. The index, direct and reverse to said judgment record book, was as follows:

DIRECT INDEX.

Plaintiff's name: Deere, Mansur & Co.
Defendant's name: J. H. Payne.
Page of judgment record: 47.

REVERSE INDEX.

Defendant's name: J. H. Payne.
Plaintiff's name: Deere, Mansur & Co.
Page of judgment record: 47.

Defendant objected to the abstract because it did not correctly give the names of the parties plaintiffs in said judgment as required by law, and did not show the amount still due on the judgment, and to the index because it did not give the names of the plaintiffs in said judgment; but the court held that said abstract and index were sufficient and gave a lien under the statutes of Texas, but did not pass on the question whether such lien existed independent of said statutes. (R., pp. 13 to 16,)

Authorities on First Proposition:

Revised Statutes of Texas, Arts. 3153, 3154, 3155, 3157, 3158, 3159.

Willis vs. Smith, 66 Texas, 31.

Putnam vs. Wheeler & Rhodes, 65 Texas, 522.

Smith vs. Chenault, 48 Texas, 455.

Wyche vs. Clapp, 43 Texas, 543.

Little vs. Birdwell, 27 Texas, 689.

Hays vs. Yarborough, 21 Texas, 488.

Bradford vs. Rogers, Vol. 2, Texas unreported cases, p. 57.

Hamilton vs. Whitney, 27 Northwestern Reporter, 276.

Freeman on Judgments, sec. 347.

ARGUMENT ON FIRST AND SECOND PROPOSITIONS ABOVE.

The articles of revised statutes of Texas on this subject are copied in brief of plaintiffs in error and it is not necessary to repeat them here.

In construing those articles the supreme court of Texas, in Willis vs. Smith, 66 Texas, p. 43 say: "The

object of the statute is not to encumber the registry with full information, but to excite inquiry and indicate the source of full information."

In Freeman on judgment, Sec. 347, it is said: "As the object of requiring a docket to be kept is to enable intending purchasers and encumbrancers to ascertain whether any judgment lien exists against property in which they contemplate investing, the names of each judgment *debtor* must be so written in the docket as to identify him and inform those who read the entry that his property is subject to the lien."

We submit that the abstract and index in this case come within the principles above announced. The main object of requiring abstracts of judgments to be recorded and indexed in the county where the land lies, is that intending purchasers from the judgment debtor may ascertain if judgment liens exist against him. Ordinarily they only know his name and do not know the names of his judgment creditors. So far as they are concerned it is only important that his name is correctly abstracted, recorded and indexed. In searching the records for liens they would only search for his name and if his name is correctly given and indexed that would be sufficient. There is no pretense but what the name of the judgment debtor, J. H. Payne, is correctly given in the abstract, record and index. If Cooke, who bought from Payne had made the slightest search in the judgment record, it cannot be pretended that he would not have discovered this record of this abstract. And the abstract sufficiently identifies the judgment. The articles above mentioned are only for the purpose of

identifying the judgment so that the purchaser can know what judgment is intended. From this abstract such a purchaser could have known in what court and when and where the judgment was rendered and the amount of it and the number of the suit and the names of the parties. This would certainly identify it. By the slightest inquiry from the clerk who made the abstract he could have seen the judgment or obtained a copy of it. The real plaintiff in the suit was the firm of Deere, Mansur & Co., and not the individuals composing said firm. The firm owned the judgment and controlled it, and the firm was properly described as the plaintiff in the suit. We think the abstract and index was sufficient. This precise question has not been passed on by the supreme court of Texas. In all the cases on judgment liens cited by plaintiffs in error the defects were in the index of the names of judgment defendants and not of judgment plaintiffs.

There are several other provisions of these Revised Statutes which require the names of the plaintiff and defendant to be stated and the decisions on them indicate the rule adopted by the supreme court of Texas in construing such provisions.

Article 1215 requires a citation to state the "names of all the parties" to the suit. In Putnam vs. Wheeler & Rhodes, 65 Tex., 522, the petition stated the names of the plaintiff to be Royal T. Wheeler, and Harry W. Rhodes, co partners and lawyers, but without giving the name of the firm. The citation described the plaintiffs as "Wheeler and Rhodes." The supreme court held this sufficient and said: "Giving the firm name of the plain-

tiffs was not such defect in the citation as required the reversal of the judgment. * * * There was no variance between the petition and the writ." Article 2281 requires an execution to describe the judgment in all essential particulars the same as is required in an abstract of judgment. It provides: "It (the execution), shall correctly describe the judgment, stating the court wherein, and the time when rendered, the *names of the parties*, the amount, if it be for money, and the amount actually due thereon, if less than the original amount, and the rate of interest, etc. In Smith vs. Chenault, 48 Tex., 55, the judgment was as follows:

A. T. CHENAULT & Co., *vs.* SMITH & YOUNG. } No. 239, May 2nd, 1870.

The judgment then ordered that the said plaintiffs (without naming them) do recover of said defendants (without naming them) the sum of, &c. Nowhere in the judgment was the names of either plaintiffs or defendants given, except in the style of the case as above given. The execution described this judgment as follows: "Whereas A. T. Chenault and John O. McGhee, on the 2nd of May, A. D. 1870, in the district court of Orange county, recovered a judgment against Elial M. Smith and Hugh F. Young for the sum, &c." The court held that the execution sufficiently described the parties to the judgment and was a valid execution. In this case we find that the only description of the plaintiffs is as given in the caption, "A. T. Chenault & Co." In making an abstract of this judgment and indexing it, the plaintiffs would have necessarily been described as "A. T. Che-

nault & Co." and no other description could have been given. But plaintiffs in error contend that giving the partnership name of the plaintiffs in the abstract and index is not sufficient to create a judgment lien. If this contention is correct, then in this case there would be a valid judgment on which execution could issue and which could be collected by execution and enforced in every other way, but from which no judgment lien could be obtained. We think that this conclusion shows the absurdity of plaintiffs' contention that the name of each member of a partnership firm who are plaintiffs must be set out in the abstract and index, and that the firm name is not sufficient.

The abstract is evidently intended to be an epitome of the judgment and to contain less than the judgment. But if the plaintiff in error's contention is correct, then the abstract in this case would have to contain more than the judgment in giving the plaintiffs' names and would have to give not only the name of "A. T. Chenault & Co.," but the individual names of this firm which were not contained in the judgment itself.

The statute only requires that the abstract shall show "the names of the plaintiff and of the defendant in such judgment." In the case at bar the pleadings and record show that Deere, Mansur & Co., as a firm, brought the suit and owned the judgment against J. H, Payne. The individuals did not own the judgment as individuals, but the firm as a distinct entity owned it. The firm was the real plaintiff in the suit and judgment. Hence we think the firm was properly described as the plaintiff. If the abstract was correct, the index was necessarily

correct. The index described the plaintiff as Deere, Mansur & Co., the same as the abstract and it could do nothing more. In the cases cited by plaintiff in error the question as to whether the plaintiff's name was correctly described in the abstract was not involved. In those cases the abstract correctly gave the plaintiff's names and the defendant's names, but the index to the defendant's name was not correctly indexed as shown by the abstract. All those cases are on the proper indexing of the abstract. In this case it is not contended that the index did not properly show the plaintiff's name as given in the abstract. Those cases simply hold that where the individual names of defendants appear in the abstract the index must conform to the abstract and show the individual names. Hence they are not in point on the question here involved as to the proper description of plaintiff in the abstract.

The laws of Texas and the rules of her courts require that the names of the parties to the suit, both plaintiffs and defendants, should be stated in the judgment. In Hays vs. Yarborough, 21 Tex., 487, it is said: "The petition states the names of the plaintiffs in full and the judgment reads: This day came the party plaintiffs, by their attorneys, etc., and further on considered by the court that plaintiffs Yarborough & Furgeson do have and recover," etc., meaning the same Yarborough & Furgerson without repeating their given names." This was held to be a sufficient description of the parties plaintiff. In Little vs. Birdwell, 27 Tex., 689, it is said: "The entry of the judgment in connection with the record leaves no doubt as to the parties in whose favor it was rendered. This

we think is sufficient." From these considerations we respectfully submit that the abstract and index were sufficient to fix the lien under the Texas statutes.

Third Proposition Under Second Assignment of Error.

When a question is first raised in the U. S. circuit court and decided by it and afterwards the state court decides differently this court does not feel bound to follow such subsequent decision.

STATEMENT.

At the time this abstract and index was held sufficient by the circuit court the State courts had not passed on the question. We do not think that the State courts have yet passed on it, but it is contended that they have.

Authorities:

In Pease vs. Peck, 18 Howard, 599 (U. S.), this court said that this court did not feel bound "in any case in which a point is first raised in the courts of the United States and has been decided in a circuit court, to reverse that decision, contrary to our own convictions in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent, declarative of the settled law of the State."

Morgan vs. Curtenius, 20 Howard, 1 (U. S.), decides the same way.

Fourth Proposition under Second Assignment of Error.

Where, under a State law, the judgment of a State court is a lien, upon an abstract of it being recorded and

indexed in the office of a State officer, a judgment of a Federal Court within such State is a lien upon all the land of the defendant situated within the jurisdiction of the Federal Court, without any abstract thereof being recorded and indexed in such State office by such State officer.

STATEMENT.

The land in controversy lay in Hunt county within the jurisdiction of the Circuit Court of the United States for the Northern District of Texas. (R., p. 9.) The judgment against J. H. Payne, under which plaintiff claimed a lien on the land, was recovered in said court on January 17th, 1882, and an index of it made by the clerk of said court in the general index of judgments kept in his office. (R., pp. 13 and 14.) The provisions of the Texas statutes in regard to judgment liens of State courts are stated in brief of plaintiff in error. The Circuit Court held the lien sufficient under the Texas statutes and did not pass on this question. (R., p. 16.)

Authorities:

Massingill vs. Downs, 7 Howard, 760 (U. S.)

Carroll vs. Watkins, 1 Abbott, 474; S. C. Vol. 20, Myers Federal decisions, p. 578.

U. S. vs. Humphreys, 3 Hughes, 201; S. C. Vol. 20, Myers Federal Decisions, p. 559.

Shrew vs. Jones, 2 McLean, 78; S. C. Vol. 20, Myers Federal Decisions, p. 549.

Branch vs. Lowery, 31 Texas, 97.

Doyle vs. Wade, 23 Florida, 90; S. C. Vol. 11, Am. State Reports, 334.

Sellers vs. Corwin, 5 Ohio, 398; S. C. 24 Am. Decisions, 301.

Campbell vs. Spence, 4 Ala., 543; S. C. 39 Am. Decisions, 301.

Freeman on Judgments, Secs. 403, 404 and 405.

ARGUMENT ON FOURTH PROPOSITION ABOVE.

Prior to the act of August 1st, 1888, there was no laws of the United States regulating judgment liens. The judgment under which plaintiff claims was rendered, January 17th, 1882, and its lien is governed by the United States law existing at that date. It will be observed that by the Texas statutes, the judgment of the state court became a lien on all the lands of the judgment defendant in the county from the time that an abstract thereof was recorded and indexed in the office of the County Clerk of the county where the land lay, and such lien continued for ten years from that date, provided an execution was issued on the judgment within twelve months from its rendition. An execution was issued on the judgment under which plaintiff claims on March 3rd, 1882, and the land was sold under another execution on September 7th, 1886. In Massingill vs. Downs, 7 Howard, 760, this court says: "In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be

created by the issuing of process or by express statute. Any other construction would materially effect, and in some degree subvert the judicial power of the Union." In Carroll vs. Watkins, supra, the United States district court for Mississippi, after reviewing Massingill vs. Downs, says: "From a careful examination of the decisions of the courts of the United States, I am satisfied that the holding is, that judgments or decees rendered in the courts of the United States become liens on the defendant situated in the district in which the judgment or decree is rendered, subject only to prior liens thereon from the date of the rendition, without reference to any law of the state not adopted by congress or the courts of the United States under congressional authority." The statutes of Mississippi construed in this decision were almost identical with the statutes of Texas on this subject. In United States vs. Humphreys, supra, the United States circuit court for Virginia, says: "The decisions of the United States courts have been in nothing more uniform, unvarying and consistent than in holding that where rights once attach under laws of congress adopting laws of the respective states, these rights are not divested by a non-compliance with conditions, restrictions or limitations contained in those very state laws where a compliance with the laws would depend upon a resort in any way to state officials or to the machinery of the state judiciary.

The provision of the code of Virginia making a judgment a lien upon the real estate of the debtor makes, in the eighth section of chapter 182, an exception in favor of a subsequent purchaser without notice, where the

judgment has not been docketed. The process of docketing depends upon the action of an officer of a state court in keeping a docket, and upon that officer's actually docketing the judgment of the United States court when presented. * * * I think it may be laid down as a rule having few exceptions, that in any case of a law of a state conferring rights upon conditions or with exceptions and adopted by congress as operative in that state, wherever the exceptions or conditions depend upon the action of state officers, so that the enjoyment of rights once conferred could be defeated or divested by the action or refusal to act, of a state officer, such a condition or exception in the state law is uniformly held by the United States courts not to limit the rights conferred by the act of congress adopting the state laws."

The court then held that the lien of a United States court judgment extended throughout the district without being docketed in the county where the land lay. In Shrew vs. Jones, supra, the same ruling is made and Mr. Justice McLean says: "The law of the state, which extends the lien of a judgment of a circuit court of the state to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to be recorded by any clerk of the state court." Freeman on judgments, section 403, says: "A state law requiring judgments to be enrolled in the county where the lands to be charged are situated before becoming liens, therefore cannot affect the lien of judgments in the Federal courts," and in section 405 he says that such judgment liens attach to all lands within the territorial

jurisdiction of the court. In Branch vs. Lowery, 31 Tex., on page 104, after reviewing Massingill vs. Downs, the supreme court of Texas says: "This obviously means that in the statute for judgment liens upon lands, authorized by the state, the principle in it is the lien which is adopted by congress, and operates in a more extend jurisdiction, unaffected by the restrictions imposed upon state courts. * * * It never could have designed by such adoption to subordinate its own tribunals to state authority. Hence we conclude that when judgment liens are created by statute in this state, the act of congress adopting the state laws as rules of decision so far as they apply appropriates, eo instanti, the principle of lien by its own inherent vigor, or else by other acts establishing the courts and defining the limits of their territorial jurisdiction; and it is made as efficacious in every part of the district as if the court was itinerant, and went from county to county to pronounce its judgment. * * * Most certainly it is unsound in political philosophy to assume that the paramount authority in a nation should be trammeled in its legitimate action by the mere policies of its inferior and subordinate members." The other authorities cited above are to the same effect.

If this court should hold that the statutes of Texas were not complied with in making, recording and indexing this abstract of judgment, then we submit that the judgment was a lien from its rendition without an abstract thereof being recorded and indexed and the action of the circuit court in admitting the abstract and index in evidence becomes immaterial and harmless.

Fifth Proposition under Second Assignment of Error.

Whenever the right to levy on and sell land exists under a judgment of a federal court, such a judgment becomes a lien on the land from its rendition without regard to state laws, requiring abstracts of judgment to be recorded and indexed in the county where the land lies.

STATEMENT.

Under the laws of Texas, plaintiffs in the judgment under which plaintiff claims had a right to sell this land which lay within the jurisdiction of the United States circuit court which rendered the judgment.

Authorities on above Proposition:

Freeman on Judgments, Sec. 339 (4th edition).
Shrew vs. Jones, 2 McLean, 78.
Massingill vs. Downs, 7 Howard, 760 (U. S).

ARGUMENT ON ABOVE PROPOSITION.

From the above authorities the rule is adduced that the right to levy on land makes the judgment a lien on the land irrespective of any statute making it a lien. If this is true then this judgment became a lien on this land from its rendition. No law of the state requiring judgments in its courts to be abstracted and docketed by state officers could control or effect the lien of this federal judgment, and this judgment was a lien without any abstract of it being recorded and indexed. If this is true, the supposed error in admitting the abstract and index becomes harmless.

FOURUH AND FIFTH ASSIGNMENTS OF ERROR.

These are copied in brief of plaintiffs in error.

First Proposition under Fourth and Fifth Assignments of Error.

Where plaintiff and defendant both claim title from the same common source, defendant cannot assert an outstanding title in a third person with whose title he has no connection.

STATEMENT.

Plaintiffs and defendants both claimed from J. H. Payne as a common source. The deed from Payne to Harrington was offered to prove outstanding title in Harrington and defendants showed no connection of their title with his. Plaintiff objected on the ground stated in above proposition. (R. p. 19).

Authorities on First Proposition Above:

Cox vs. Hart, 145 U. S., 376.
Robertson vs. Pickrell, 109 U. S., 608, (U. S.)
Mickey vs. Stratton, 5 Sawyer, 475.
Cooper vs. Galbraith, 3 Wash., Circuit Court, reports p. 546.
Griffin vs. Sheffield, 38 Miss., 359, S. C. 77 Am. decisions, 646.
Carson vs. Smart, 12 Ire., 369, (N. C.)
McDonald vs. Badger, 23 Cal., 394.
Freeman on Executions, Vol. 2, Sec. 351, (2nd edition.)

Bigelow on Estoppel, p. 346, (4th edition.)
Malone on Real Property Trials, p. 320.
Waits' Action and Defenses, Vol. 3, p. 11.

Argument on First Proposition Above:

In Robertson vs. Pickrell, 109 U. S., 608, this court says: "Nor can the grantee in a contest with another, whilst relying solely upon the title to him, question its validity when set up by the latter. In other words, he can not assert that the title, obtained from his grantor or through him, is sufficient for his protection and not available to his contestant. Where both parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance."

In Cox vs. Hart, appealed from the Northern District of Texas and decided by this court on May 16, 1892, this court held that where plaintiff and defendant claimed under the same common source, the defendant could not show that the common source had conveyed away his title or show that the common source had no title. This court there says: "He (plaintiff,) claimed under DeCordova, by virtue of the marshal's deed conveying all his right, title and interest in the lands in dispute. The plaintiff introduced the deed from DeCordova's administrator to Cox for the purpose of showing a common source of title with the defendants. The defendants introduced the same deed without disclaiming the title conveyed by it for the purpose of showing title in themselves, as well as good faith in making improvements. So that upon this branch of the case, it appearing that

the parties claimed under a common source, the law was clearly for the plaintiff, unless the defendants had established a superior right in themselves, etc." The principle in this decision is that defendant cannot show that the common source had no title either by proving his title a forgery or that he had conveyed it away to a third party.

In Bigelow on Estoppel, p. 346, (4th edition), it is said: "Nor can a grantee question the validity of his grantor's title at the time of his conveyance in a contest with another who claims under the same grantor, unless he claims under a paramount title which he has himself acquired or connected himself with. He cannot assert the existence of such paramount title or allege any defect in his grantor's title, nor can he say that the conveyance which he has accepted was made in fraud of his grantor's creditors, so long as he claims under that title alone."

Freeman on Executions, Sec. 351 (2nd edition), says: "If he, (defendant in execution) was in possession of the property sold, he must surrender such possession to the purchaser, and he cannot avoid his obligation to do so by showing that his title is invalid, and that a third person is the true owner and is entitled to the possession. * * * * * . All persons who come into possession under the defendant in execution, after the lien of the judgment or of the levy has attached, hold rights subordinate to the lien, and can assert no defense against the purchaser which would not be equally available to the defendant in execution."

The other authorities cited above announce the same rule. We submit that the court did not err in sustain-

ing these two objections and in excluding this deed of assignment.

Second Proposition under Fourth and Fifth Assignment of Error.

The facts show that if Harrington ever had any title to this land, his title was barred by limitation and was not a valid, subsisting outstanding title.

STATEMENT.

The deed of assignment from J. H. Payne to Y. D. Harrington was made October 16, 1880, (R. p. 19). The agreement of counsel read in evidence, showed that "ever since the date of said deed of assignment the said Payne and the said Cooke, claiming under said Payne, have consecutively held peaceable and adverse possession of the land in controversy in this suit, cultivating, using or enjoying the same and paying taxes thereon and claiming under a deed or deeds duly registered, the deed to Payne antedating said deed of assignment and that to Cooke in evidence. It is also agreed that the assignee, Y. D. Harrington, never made any claim of title to said land by virtue of said deed of assignment or otherwise."

Revised Statutes of Texas, Art. 3193, is as follows: "Every suit to be instituted to recover real estate as against any person holding peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five

years, next after the cause of action shall have accrued and not afterwards."

Art. 3196 R. S. of Texas, is as follows: "Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims."

J. H. Payne was in possession under a deed prior to October 16, 1880; Cooke received his deed from Payne January 2, 1886; the Marshall's deed was made September 7, 1886; this suit was tried June 8, 1889. (R. p. 22). Plaintiff objected to the deed of assignment on the ground (3rd) that the facts showed that any title that Harrington may have had was barred by limitation and was not a valid and subsisting outstanding title. The court sustained this objection also. (R. pp. 19 and 20).

Authorities on Second Proposition above:

Revised Statutes of Texas, Art. 3193 and 3196.
Craig vs. Cartwright, 65 Texas, 413.

ARGUMENT ON SECOND PROPOSITION ABOVE.

The ground of this objection was that in order to be a valid defense the outstanding title must be a valid and subsisting title which could be enforced. If it appeared that Harrington's title could not be enforced against Payne then it was not a defense of outstanding title. This fact could be shown by plaintiff without any pleading on his part no matter what might be the facts which rendered this outstanding title inoperative. Hence it

was not necessary for plaintiff to specially plead that this outstanding title was barred by limitation or any other fact showing that this outstanding title was bad. Again, the rule that the statute does not run against the grantor who remains in possession does not apply to the facts of this outstanding title. This deed of assignment does not mention this land specifically. The rule is that a grantor remaining in possession is presumed to hold in subordination to his deed unless the contrary appears from the evidence and this presumption only continues for a reasonable time. In this case the facts show that Payne never held in subordination to the assignment but openly and adverse to it, claiming the land as his own and that the assignee never asserted or claimed any title to it. Again, if the statute of limitation divested Harrington of his title and vested it in Payne this would not defeat plaintiff's title, because plaintiff never acquired his title until the marshall's deed in September, 1886, and until that time the statute of limitation would not run against him or his vendors.

Third Proposition under Fourth and Fifth Assignments of Error.

When an assignee makes final report to the court and is discharged by the court and ceases to act, his title is extinguished and the title to any property conveyed to him by the assignment reverts to the assignor.

STATEMENT.

Neither the deed of assignment nor the inventory and schedules mentions this land. (R., p. 19.) The

agreement of counsel read in evidence shows: "that Y. D. Harrington, assignee, fully administered said trust, by said deed of assignment conferred, prior to July 1, 1881, and made final report of his proceedings thereunder, to the proper court and was discharged by said court prior to said July 1, 1881, and ever since said date has ceased to act as such trustee." (R., p. 17.) Plaintiff objected to the deed of assignment on the ground (4th) that said assignee had closed up said assignment and ceased to act as assignee and been discharged by the court prior to July 1, 1881, and if he ever had any title to the land in controversy, said title was extinguished and the title to the land reverted to J. H. Payne and those claiming under him. (R., p. 20.) The court sustained this objection also. (R., p. 20.)

Authorities on Third Proposition Above:

Article 65 q. Sayles' Texas Civil Statutes, provides that an assignee shall make a final report of his proceedings to the court, which report shall be filed and recorded, and thereafter no action shall be brought against him except within twelve months after such filing; and he shall deposit any money or funds on hand with the clerk of the district court to be paid out under the orders of the court.

Herndon vs. Davenport, 75 Tex., 462.

Jones vs. Pyron, 57 Tex., 47.

Argument on Third Proposition Above.

No decision in Texas has been made directly on this point, but the above decisions on the bankrupt laws were

on similar facts and we think are in point on our assignment law on this question.

In Herndon vs. Davenport, supra, the court says: "If the land belonged to John H. Herndon, it passed to his assignee in bankruptcy, for the purposes of that proceeding, whether scheduled or not, but if not disposed of by the assignee at the termination of the bankrupt proceedings, title remained in John H. Herndon. Jones vs. Pyron, 57 Tex., 47. Title of assignee in bankruptcy could not be set up by appellees as outstanding superior title to that presented by appellants."

Fourth Proposition Under Fourth and Fifth Assignment of Error.

The complicated deed of assignment was not admissible under the pleadings of defendants.

STATEMENT.

Defendants simply pleaded that if they were not the owners of the land the title was outstanding in one Y. D. Harrington, to whom it was conveyed by J. H. Payne before plaintiff's lien attached. (R. p. 11.) The deed of assignment is very lengthy and complicated, (R. p. 19.) Plaintiffs objected to it on the ground (5th) that it was not admissible under defendant's pleadings, and the court sustained the objection. (R. p. 20.)

SIXTH AND EIGHTH ASSIGNMENTS OF ERROR.

These are copied in brief of plaintiffs in error.

First Proposition under Sixth and Eighth Assignments of Error:

In the action of trespass to try title in Texas, if the defendant pleads "not guilty" and also pleads a special defense, such as outstanding title in a third party, the plea of not guilty is considered as waived, the same as if it had not been pleaded, and he will be confined in his evidence to his special defense and no evidence on any other defense is admissible.

STATEMENT.

Defendants pleaded (1) not guilty; (2) a suggestion of improvement in good faith, (R., p. 7,) and (3) a special defense of outstanding title in Y. D. Harrington which is as follows:

"And the said defendants, (J. H. Cooke and wife, M. E. Cooke,) further say that if they are not the owners of the land in controversy, the title thereto is outstanding in one Y. D. Harrington, to whom it was conveyed by said J. H. Payne before the lien under which plaintiff claims attached and defendants deny all the averments of said petition." (R., p. 11.)

Defendants, J. H. and M. E. Cooke, offered to introduce in evidence, to prove their title to the land in controversy, the original deed made by J. H. Payne and wife to J. H. Cooke, dated January 2nd, 1886. (R., p. 20) To this plaintiff objected on the ground "that said defendants having specially pleaded an outstanding title as a defense, could not prove title in themselves." The court sustained this objection. (R., p. 20.) Said defend-

ants offered to prove "that from January 1, 1882, until the sale to defendant Cooke said J. H. Payne was the head of a family consisting of a wife and children, and that the land in controversy was claimed and used by him as his homestead, and that the same was at no time subject to judgment lien, execution, levy or sales through which plaintiff claimed." (R., p. 21.) To this plaintiff objected on the ground "that having pleaded an outstanding title the defendants could not rely upon other defenses to said suit." The court sustained this objection. (R., p. 21.)

Authorities on above Proposition:

Shields vs. Hunt, 45 Texas, 424.
Custard vs. Musgrove, 47 Texas, 217.
Rivers vs. Foote, 11 Texas, 662.
St. Louis &c. R. R. Co. vs. Whitaker, 68 Tex., 630.
Joyner vs. Johnson, vol. 19, Southwestern Reporter, page 522, (Texas).

ARGUMENT ON ABOVE PROPOSITION.

If this court holds that the lien of the judgment under which plaintiff claims is valid, then the alleged error in excluding this deed becomes immaterial and need not be considered. This is admitted in the brief of plaintiff in error on page 48. Plaintiff in error in his brief on page 49 admits the proposition above to be correct. He says: "If the defendant in the statutory action pleads not guilty and especially pleads another defense, he thereby waives the general issue and is confined to the defense specially pleaded." He seeks to avoid this rule

by saying that this was not a statutory action of trespass to try title. But we submit that it was such statutory action. The petition contains all the requisites prescribed by the Texas statutes and it was so treated by the court and parties below and is so described in plaintiff in error's brief on page 1. The allegations of title which they claim change the action are simply allegations to show that the circuit court had jurisdiction and for that purpose only. As well might it be claimed that the averments as to the citizenship of the parties changed the action from the statutory form. And again, whatever might have been the allegations of the petition, the defendants could have pleaded simply "not guilty," and thus have been allowed to introduce this deed and other defense, but they did not do this and specially pleaded outstanding title and clearly under the above rule they could not rely on any other defense. Nor was it admissible under plaintiffs' pleadings. The defendants having specially pleaded outstanding title and thus given plaintiff notice that this was the only defense on which they relied they must be confined to such defense without regard to any pleading of plaintiff.

In Joyner vs. Johnson, 19 Southwestern Reporter, 522, decided April 29, 1892, the supreme court of Texas say: "The principle which underlies this doctrine is that where a party either plaintiff or defendant, in an action of trespass to try title, pleads his title specially, he gives his adversary notice that he rests his case upon the tittle so pleaded and it is to be presumed that he relies upon no other." The alegations of the petition in

regard to deed from Payne to Cooke, were for the purpose of showing common source and jurisdiction and under the Texas statutes, defendant could not introduce any evidence under these allegations, but must rely on his own pleadings. (Revised Statutes of Texas, Art. 4802). In this case plaintiff proved his title. Defendants pleaded specially that the title was outstanding in Y. D. Harrington. Under the rules announced in above decisions, plaintiff had a right to presume that they relied on no other defense. Plaintiff was not required to come prepared with evidence to show that they had no title in themselves or that the land was not the homestead of Payne or to disprove any other defense. The defense of homestead is an affirmative defense and when plaintiff proves a record title he must recover, unless the defendants prove by a preponderance of evidence that the land was homestead.

When plaintiff proved a lien against J. H. Payne he could rest his case and was entitled to recover unless defendants proved that the land was the homestead of Payne. Plaintiff was not required to prove a negative and prove that the land was not Payne's homestead. When he proved a proper lien he made a prima facie case, and the burden was then on defendants to defeat it. But under the above decisions such a defense was not admissible when defendants had specially pleaded an outstanding title and thus given plaintiff notice that this was the only defense upon which they would rely. This proof of homestead was not in rebuttal of any thing offered by plaintiff. Plaintiff was not required to, and had not offered any proof as to homestead, and the evi-

dence offered by defendants could not have been in rebuttal of anything proved by plaintiff. This proof offered by defendant was in the nature of a confession and avoidance of plaintiff's lien. Having specially pleaded an outstanding title and thus waived the general issue, if they wanted to prove anything in confession and avoidance or any other defense except outstanding title it was necessary that they should have specially pleaded such defense. Nor had the defendants specially pleaded that the land was Payne's homestead. Except the plea of outstanding title the only other plea of defendants was improvements in good faith. This plea was not intended as a plea in defense of the suit or as setting up the title under which defendants claimed, but was intended to be used only in case plaintiff recovered in order to let in improvements in good faith. It cannot now be perverted in order to let in defenses to plaintiff's title which would not be admissible under the other pleadings of defendants, and even in this plea defendants did not allege that the land was the homestead of Payne, but only that he purchased the land "in the *belief* that the said tract of land was the homestead of said J. H. Payne."

It follows from the foregoing that the court did not err in sustaining this objection.

SEVENTH ASSIGNMENT OF ERROR.

This assignment is copied in brief of plaintiff in error.

First Proposition under Seventh Assignment of Error.

Before defendant can claim compensation for improvements, he must have been in adverse possession of the land in good faith under a claim of title for twelve months before the commencement of the suit. In order to be in good faith he must have some written evidence of his title and must have reasonable grounds to believe that his title is good. A mere verbal contract to convey, without the payment of any consideration, is not sufficient to make him a possessor in good faith so as to entitle him to such compensation.

STATEMENT.

The brief of plaintiff in error contains (pp. 51 and 52,) a statement of the evidence offered on this point.

The Revised Statutes of Texas on this subject are as follows:

"Art. 4813. The defendant in any action of trespass to try title, may allege in his pleadings that he and those under whom he claims have had adverse possession in good faith of the premises in controversy, for at least one year next before the commencement of such suit; and that he and those under whom he claims have made permanent and valuable improvements on the land sued for during the time they have had such possession, stating the improvements and their value respectively, and stating also the grounds of such claim."

"Art. 4814. When the defendant has filed his claim for an allowance for improvements in accordance with the preceding article, if the court or jury find that he is not the rightful owner of the premises sued for, but that

he and those under whom he claims have made permanent and valuable improvements thereon, being possessors in good faith, the court or jury shall at the time estimate from the testimony.

1. The value at the time of trial of such improvements as were made before the filing of the suit, not exceeding the amount to which the value of the premises is actually increased thereby.

2. The value of the use and occupation of the premises during the time the defendant was in possession thereof (exclusive of the improvements thereon made by himself or those under whom he claims) and also if authorized by the pleadings, the damages for waste or other injury to the premises committed by him, not computing such annual value for a longer time than two years before suit, nor damages for waste or injury done before said two years.

3. The value of the premises recovered, without the improvements made as aforesaid.

Authorities on First Proposition above:

House vs. Stone, 64 Tex., 685.

Hatchett vs. Connor, 30 Tex., 105.

Powell vs. Davis, 19 Tex., 380.

Armstrong vs. Oppenheimer, Vol. 19 Southwestern Reporter, 529 (Texas.)

Morrill vs. Bartlett, 58 Tex., 644.

Elam vs. Parkhill, 60 Tex., 581.

ARGUMENT ON FIRST PROPOSITION ABOVE.

In this case defendants were clearly not in possession for twelve months before commencement of suit

under any written evidence of title. But in order to complete the time they proposed to prove that prior to their deed they were in possession under a verbal contract to convey. But they never paid any of the consideration until their date of this deed. No court would have enforced specific performance of this contract. Certainly such a verbal contract was void and conferred no title nor the semblance of a title. No reasonably prudent person could have believed that he had any title under such a contract. This claim for improvement is not allowed by the common law and the defendant must bring himself fully within the statute allowing it. The decisions of Texas show that the defendant must have at least written evidence of title when he makes his improvements in order to be a possessor in good faith.

In Hatchett vs. Connor, 30 Texas, on p. 107, the reporter says: "As to the improvements, the defendants having failed to prove a paper title, the question of good faith was hardly in the case." On page 109 of this case the supreme court says: "The jury were instructed in substance that if the appellant honestly believed his title to be good, or that his vendor's title was good, he was entitled to the value of his improvements, etc." This is clearly erroneous with reference to the facts of this case, as it is not pretended that the appellant has shown that either he or his vendor hold by any claim or title derived from the government. It is difficult to perceive how a party can honestly believe that his title is good, or how his possession can be in good faith, when he is unable to trace his title back to the government, the only source of title to land. While a defective or

irregular apparent title may be the basis for a recovery for improvements made in good faith, a void title (if such an expression may be used) cannot be."

In Morrill vs. Bartlett, 58 Texas, 644, it is held as shown by the syllabus, that: "A claim under the statute by a defendant sued for lands that he had made permanent and valuable improvements thereon, cannot be regarded when there is no evidence that he ever paid anything for the lands, or received a deed therefor; and when he was informed of the controversy which jeopardized his possession before improving the land."

As the judgment lien under which plaintiff claims was recorded, we submit that defendants must be held to have been fully informed of it before they commenced to improve the land.

In Elam vs. Parkhill, 60 Texas, 581, it is said: "To entitle a party to a recovery for the value of improvements, it is essential that he be a possessor in good faith. * * * *. While title is not essential upon which to predicate a claim for the value of improvements, it is necessary that the party should enter and claim under color of title. That is, the party must claim under an apparent title, which he in good faith believes to be the real title to the land."

In Powell vs. Davis, 19 Texas, 380, the court says: "The plea simply avers that the defendant entered upon the land in good faith, believing it to be vacant, and that he made lasting, permanent and valuable improvements thereon of the value of three thousand dollars, which he claims in reconvention. It is evident that this plea does not contain sufficient averments of fact to entitle defendant to compensation for improvements. It

does not aver that defendant entered under title or claim of title or right."

In House vs. Stone, 64 Texas, on pages 685 and 686, the court says: "Mere good faith alone, however, irrespective of any considerations whatever in respect to the character of title under which a defendant claims improvements, is by no means sufficient to support such claim. * * * * * . If a purchaser will not look to the character of the title by virtue of which he enters and improves land, but will close his eyes and recklessly act on the presumption that any one who will sign a deed has a valid title, he has no one to blame but himself. * * * * * . In the cases just quoted from, it may be deduced from the opinions in them, that where the facts known by the claimant for improvements in respect to the title under which he claimed were such that, as a matter of obvious law and right, he must know, and can leave no room for questioning the fact that he has neither a title nor the semblence of an apparent title, that the law will conclusively determine that his claims of ownership, in the nature of things, cannot be made in good faith, because it is wanting in the essential foundations on which any valid title can rest."

We also call the court's attention to the fact that the bill of exceptions does not state that Cook erected any of his improvements before he received his deed from Payne in January, 1887, or even before the commencement of this suit, but only states that he erected them before he knew of the judgment lien and does not state when this was. It is distinctly stated that he did not pay any consideration until the

date of said deed. It will not be presumed by this court that he made any before he had any title. If this is so, then up to January, 1887, Cook was simply in possession under a parol contract to convey without having paid any consideration or erected any improvements. Under these circumstances, he certainly had no equity and no contract which a court of equity would have enforced. But if he had erected improvements prior to January, 1887, still he could not have enforced his contract. In order to compel specific performance two things must concur, viz.: 1, He must have erected valuable improvements, and 2, He must have paid or tendered the purchase money. Cooke never paid or tendered the purchase money until the date of his deed in January, 1887, less than twelve months before the commencement of this suit.

From the foregoing considerations and decisions we submit that the court did not err in sustaining this first objection.

Second Proposition under Seventh Assignment of Error.

In order to claim improvements, the possession of defendants must have been *adverse* to the plaintiff in this suit for twelve months before this suit was commenced. Such possession was not adverse until the marshal's deed which was less than four months before commencement of this suit.

STATEMENT.

Plaintiff objected to the proof offered on this ground also, but the court did not rule on this objection. (R., p. 21.)

Plaintiff claimed title under a judgment lien and execution and marshal's deed thereunder. The marshal's deed was executed on September 7, 1886. (R. p. 14.) This suit was commenced December 24, 1886. (R. p. 17.)

Authorities Under Above Proposition:

Pratt vs. Pratt, 6 Otto, 704. (U. S.)
Whitaker vs. Allday, 71 Tex., 623.

ARGUMENT ON SECOND PROPOSITION ABOVE.

In Whitaker vs. Allday, supra, in speaking of the adverse possession of a defendant claiming improvements, the court says: "The possession for the period provided by law must be adverse to the plaintiff in the suit." In Pratt vs. Pratt, supra, plaintiff claimed title through a judgment lien, execution and marshal's deed; defendant had bought the land from the judgment debtor during the existence of the judgment lien and before the marshal's deed was executed; defendant contended that his possession was adverse before the marshal's deed was made and plaintiff contended that it could not be adverse until after the marshal's deed was made to him. This court there says: "It is obvious from this recital that there was no one who could lawfully enter upon the land in defendant's possession until plaintiff's judgment lien had become perfected into a legal title by sale and conveyance. * * * The defendant having purchased the land of the person who had the legal title, does undoubtedly hold adversely to every body else. He admits no better right in anyone. He is no man's tenant. The right by which he holds possession is superior to the

right of all others. He asserts this and he acts on it. His possession is, in this sense, adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land, a lien which does not interfere with his possession, which cannot disturb it, but which may ripen into a title superior to that under which he holds, but which is yet in privity with it. In the just sense of the term, his possession is *not adverse* to this lien. There can be no adversory rights in regard to the possession under the lien, and under the defendant's purchase from the judgment debtor, until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff. * * * It can make no difference in the principle asserted whether the lien be created by a judgment or by a mortgage."

Under these decisions we submit that defendant's possession did not become adverse until the date of the marshal's deed on September 7, 1886, which was less than four months before this suit was commenced on December 24, 1886, and the court should have sustained the objection to this proof based on this ground also.

Third Proposition under Seventh Assignment of Error.

Under a claim for improvements, unless the defendants prove, or offer to prove the value of the land without regard to the improvements, such claim must be disregarded and will not be allowed.

STATEMENT.

Defendants offered to prove that before they knew of the judgment lien they erected improvements of

the value of $10,000.00 which enhanced the value of the land by that amount. But they nowhere proved or offered to prove the value of the land without regard to improvements. The bill of exceptions also does not state that these were erected before Cooke received his deed from Payne on January 2, 1887, or before the commencement of this suit, but only before they knew of the judgment lien.

Authorities under Third Proposition above:

Revised Statutes of Texas, 4814.
Thomas vs. Quarles, 64 Texas, 491.

ARGUMENT ON THIRD PROPOSITION ABOVE.

Article 4814, Subdivision 3, requires the jury to estimate from the testimony: "The value of the premises recovered, without the improvements made as aforesaid."

In Thomas vs. Quarles, supra, the court says: "In the court below the defendant pleaded improvements in good faith, but on the trial there was no evidence of the value of the *land without the improvements*, and hence their value and defendants' good faith were not passed upon in the findings. There was proof of the value of the improvements made. But the statute does not award to defendant such value, but only the difference between the value of the land with and without the improvements. The defendant, therefore, in failing to prove the value of the land, left the court below without the means of awarding him the benefit of his plea." Under this decision, the error, if any, in excluding this evidence, was immaterial and harmless. This court will not re-

verse and remand a case for the purpose of admitting evidence, which, when admitted, cannot change the result. If this testimony had been admitted, the court would still have been bound to disregard the claim.

Fourth Proposition under Seventh Assignment of Error.

A claim for improvements in good faith did not exist at common law, but is an equitable claim, and cannot be adjudicated in a common law action in the federal courts, such as this action is.

Authorities:

2 Story's Equity, 799 *a*.

TENTH ASSIGNMENT OF ERROR.

This is copied in brief of plaintiff in error.

STATEMENT.

In the brief of plaintiff in error (p. 1.) it is admitted that J. H. Cooke and M. E. Cooke were husband and wife on January 2, 1886, when the deed from J. H. Payne and wife to J. H. Cooke was executed and when J. H. Cooke and wife, M. E. Cooke, executed a deed of trust on the land to the Scottish-American Mortgage Co., and on page 58 the brief says: "The record shows M. E. Cooke to be the wife of defendant J. H. Cooke." She was treated by the court below as having been the wife of J. H. Cooke during all these transactions.

Authorities:

The answer of M. E. Cooke is an admission that she was in possession of the land under the Texas practice

and she was a proper party to the suit. The community system of property prevails in Texas. By it a deed to land made to the husband vests the title in the community equally for him and his wife and this confers title on her. She being the wife of J. H. Cooke, when plaintiff introduced the certified copy of deed from J. H. Payne to J. H. Cooke, this showed that she held the same title as he did from the common source.

King vs. Holden, Vol. 16, Southwestern Reporter, p. 898, (Texas) is directly in point on this question.

In Veramendi vs. Hutchins, 48 Tex., on p. 550, the court says: "It is believed to be a doctrine thoroughly incorporated into our legal system that the interest of the husband and wife in community property is equal, and that it is immaterial whether the grant or deed thereto be in the name of the husband or wife separately or to them jointly." In Mitchell vs. Marr, 26 Tex., 330, it is said: "No doctrine is better settled than that property purchased during the marriage, whether the conveyance be in the name of the husband or the wife or in the joint names of both, is to to be taken prima facie to belong to the community." It thus appears that M. E. Cooke held by the same title as her husband, J. H. Cooke, and if the judgment was proper against him it is against her. But if this court should think otherwise, we now offer to have executed such releases as will cure the error as to her or the judgment may be reformed so as to cure it.

ELEVENTH ASSIGNMENT OF ERROR.

This is copied in brief of plaintiff in error.

STATEMENT.

The proof was that the Scottish-American Mortgage Co. only had a deed of trust on the land without ever having been in possession and no judgment for damages against it would have been proper. (R. p. 16 and 17.)

We respectfully ask that the judgment be in all things affirmed.

JOHN M. AVERY.

Attorney for W. W. Avery, defendant in Error.

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Office Supreme Court U. S.
FILED.
NOV 14 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

TERM No. 72.

WRIT OF ERROR FROM THE U. S. CIRCUIT COURT FOR NORTHERN DISTRICT OF TEXAS.

J. H. & M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

MOTION TO STRIKE OUT THE BILLS OF EXCEPTION OF PLAINTIEF IN ERROR, AND BRIEF AND ARGUMENT ON SAID MOTION.

JOHN M. AVERY,
Attorney for Defendant in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

TERM No. 72.

J. H. & M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

MOTION TO STRIKE OUT BILLS OF EXCEPTION.

Now comes W. W. Avery defendant in error, in above case, and moves the court to strike out and not consider all the bills of exceptions (Nos. 1 to 8 inclusive) of the plaintiffs in error for the following reasons, viz:

The printed record (pages 1 and 22) in this case shows that this case was tried before and the judgment rendered by the U. S. Circuit Court held by Hon. L. Q. C. Lamar, circuit justice presiding, Hon. Don A. Pardee, circuit judge and Hon. A. P. McCormick, district judge. These bills of exceptions (pages 13 to 22) were approved and signed only by Hon. A. P. McCormick, district judge. The record shows no reason why they were not approved and signed by the presiding justice who tried the case with the district judge. And according to law, they are void and should not be considered by this court.

John W. Avery

Attorney for W. W. Avery, defendant in error.

Brief and Argument of Defendant in Error on Motion to Strike Out Bills of Exceptions.

The printed record (p. 1) shows that on June 8, 1889, the circuit court of the United States, for the Fifth circuit and Northern district of Texas convened, there being present Hon. L. Q. C. Lamar, associate justice of this court, presiding; Hon. Don. A. Pardee, circuit judge, and Hon. A. P. McCormick, district judge. These three judges sat together as the court. The judgment (Record p. 22.) shows that on the same day, June 8, 1889, this case came on for trial before this court, composed of these three judges, and a trial was had and a judgment rendered for defendant in error. These bills of exception are approved and signed alone by Hon. A. P. McCormick, district judge (R. p. 22.) and no reason is shown by the record why they were not approved and signed by the presiding judge.

It clearly appears from the different provisions of the United States Revised Statutes that the presiding judge in the trial of a cause is to make the rulings and decisions and he is required to sign and authenticate the bills of exceptions.

Sec. 614, U. S. Rev. Statutes provides: That when a district judge holds a circuit court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge.

Sec. 650 U. S. Rev. Statutes provides: Whenever in any civil suit or proceedings in a circuit court held by a circuit justice and a circuit judge, or a district judge, or

by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or anything to be decided, ruled or ordered by the court, the opinion of the presiding justice or judge shall prevail and be considered the opinion of the court for the time being.

Sec. 953 U. S. Rev. Statutes provides: A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto.

It is evident from the above sections that the presiding judge or justice must make the rulings on the trial and sign the bills of exceptions, and that the district judge has no such authority in such a case. And this is entirely proper. The presiding justice or judge who makes the rulings, certainly must know better than anyone else what those rulings are and his reasons for making them, and he is better able to certify by bill of exceptions as to the facts of his rulings. If any other practice is allowed, then the rulings will be made by one judge upon reasons which might be entirely satisfactory, but the bill of exceptions will be allowed and signed by another judge and may not present the facts as the presiding judge understood them. In this way this court would be reviewing the rulings of the presiding judge upon a state of facts different from the ones on which he made his rulings. We have found very few cases in the state courts bearing on this question, but these few sustain our views.

In Wagner vs. Zeigler, 44 Ohio St., 59 the court holds that: A paper purporting to be a bill of exceptions signed by only one judge out of three holding district court will not be considered as part of the record. To the same effect is Fechmeier vs. Traunsteine, 12 Colo., 282. See also Mussina vs. Cavazos, 6 Wallace, 355.

We respectfully ask that these eight bills of exception be stricken from the record, and be not considered by this court.

JOHN M. AVERY,
Attorney for W. W. Avery, Defendant in error.

FILED.
NOV 16 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR TO THE MOTION OF DEFENDANT IN ERROR TO STRIKE OUT BILLS OF EXCEPTIONS.

M. L. CRAWFORD,
Counsel for J. H. and M. E. Cooke, Plaintiffs in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

In the Supreme Court of the United States,

OCTOBER TERM, 1892.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

J. H. COOKE and M. E. COOKE, Plaintiffs in Error,

vs.

W. W. AVERY, Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR TO THE MOTION OF DEFENDANT IN ERROR TO STRIKE OUT BILLS OF EXCEPTIONS.

The question presented by this motion arises out of the fact that the circuit justice sat with the district judge in the circuit court in the trial of the case, and the bills of exception were signed by the district judge alone. For this reason it is contended that the bills are not properly authenticated and should be stricken out.

None of the citations, either to the United States revised statutes or decisions, in the brief and argument in support of the motion, have any bearing upon the question raised, except section 953. Section 614 relates only to cases brought by appeal or writ of error from the dis-

trict to the circuit court: section 650 simply provides that in case of difference of opinion between the judges holding the circuit court, the opinion of the presiding judge shall, for the time being, be the opinion of the court. Neither of these sections lends any aid in passing upon the question involved in the motion. The same is true of the decisions cited. In each of the cases referred to the appellate court refused to consider the bill of exceptions, but on grounds which throw no light on the question here presented.

In *Wagner vs. Zeigler, 44th Ohio St., p. 59*, one out of three judges holding the district court signed the bill of exceptions. The state statute on the subject provided "If the exception be true * * * a majority of the judges composing the court *must* allow and sign it before the case proceeds."

In *Techmeier vs. Traunsteine, 12th Colorado, p. 282*, the bill was tendered a judge who did not sit in the case at all, but was simply a judge of the same court. At least this is what we gather from the report of the case. In this case, too, the bill was not tendered or filed within the time prescribed by the statute.

In *Mussina vs. Cavazos, 6th Wallace, p. 355*, the bill was neither signed or sealed by any judge.

Section *953 U. S. Revised Statutes*, is the only citation bearing upon the question presented by the motion, and any further consideration of the other citations would be unprofitable.

The main if not the only purpose of this section was to dispense with the necessity of sealing as well as signing a bill of exceptions. *Origet vs. United States, 125*

U. S., p. 244. Prior to the enactment of this section it was a question whether a bill of exceptions did not have to be sealed as well as signed, the inclination being to hold that a seal was necessary. The purpose of section 953 seems to have been to put that question at rest. Except by dispensing with the seal the act introduced no new rule.

Counsel for defendant in error, construe section 953 as a mandatory statute, prescribing how a bill of exceptions shall be authenticated, and from such position argue that the bills in this case are not authenticated in the manner prescribed by the statute, and therefore cannot be considered.

It is to be observed that the section does not declare that the bill shall be authenticated in the manner indicated, nor does it declare that it shall not be sufficient if authenticated in some other manner; it simply makes the designated manner of authentication sufficient. We take it that any other mode of authentication than that pointed out by the statute which the court would hold good if the statute did not exist, the court is still at liberty to hold good, notwithstanding the statute. It cannot hold the statutory mode insufficient, but it may hold any other mode sufficient. The court judicially knows that the various circuits of the United States are so large and the courts held therein so numerous, that the circuit justice or the circuit judge cannot spend any considerable time at any particular court, and but little of that time in hearing common law cases. If the case is lengthy the circuit justice or circuit judge frequently does not sit through the entire case, but is obliged to leave the court

in the midst of a trial. If all three of the judges should be present at the beginning of a trial and before the end thereof, the circuit justice should leave the bench, and then the circuit judge, leaving the district judge to finish the trial, it would be necessary, under the view taken in this motion, to have the three sets of bills of exceptions, though the rulings may all have been actually made by the district judge. Before the bills could be prepared in form, the circuit justice might again be in Washington, and the circuit judge at some remote point in his circuit. Such a practice we believe has never obtained in this circuit, and if it has obtained in any other circuit we are not aware of it. Such a practice would be intolerable in its inconvenience, and has no basis in reason to justify it.

The bills of exception in this case involve questions of purely local law, with the exception perhaps of one that involves a jurisdictional question. In questions of local law the district judge, as the court well knows, usually actually makes, and it is the best qualified to make the rulings. It does not appear who made the rulings complained of in this case. Defendant in error relies upon the fact that the printed record, page one, shows that the circuit justice and the circuit judge, as well as the district judge, were present when the court met, the circuit justice presiding. He assumes that that is a sufficient showing that the circuit justice made the rulings complained of. The circuit justice and circuit judge may have been present at the trial that followed the meeting of the court, or may not have been. If they had left when the trial began the minutes of the court would have

been the same. It does not affirmatively appear that the circuit justice presided at the trial, nor that the district judge was not presiding when all the rulings complained of were made. The record simply shows that the justice was presiding when the court opened, but does not say who was presiding when the rulings complained of were made. Before a motion to strike out the bills of exception should be sustained on account of the fact that they were not signed by the presiding judge, we think the record should affirmatively show who the presiding judge was when the rulings were made, and that the judge who signed the bills of exceptions was not at that time the presiding judge. The exceptions were duly taken at the trial, and the district judge certifies that in evidence of the approval by the court of the said bills of exception, he affixed his official signature, etc. (Printed Record, p. 22). It no where appears that said bills of exception do not speak the truth or that they are in any manner incorrect; neither is it intimated that any damage has been occasioned defendant in error by not having the bills signed by another judge. The office of a bill of exception is to show truly what occurred upon the trial in reference to the particular matter complained of, and when the history of what there occurred is preserved in such form and so authenticated as to convince the court of its genuineness and correctness, it should be held sufficient.

The practice contended for by defendant has not, so far as we know, been the practice of the United States courts, and following it would be productive of the utmost inconvenience and confusion without any compen-

sating advantages; while in theory the bill of exceptions is settled at the time it is taken at the trial, as a matter of practice the court knows that the point is only there reserved and the bill is afterwards formally prepared, and the rules of this circuit designate the time in which they should be prepared and submitted to opposing counsel, and the time in which opposing counsel shall pass upon them and make such objections as he may have to them before they are signed.

If the rule contended for by defendant in error is to obtain it would be necessary hereafter to note not only the exception taken but the judge who is presiding at the time it is taken, and the bill of exceptions when formally prepared would have to be sent to that particular presiding judge no matter where he may be, notwithstanding another judge was present and took part in the trial and actually made the rulings complained of.

For the reasons suggested we respectfully submit that defendant's motion should be overruled.

M. L. CRAWFORD,

Counsel for J. H. and M. E. Cooke, Plaintiffs in Error.